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OFFICIAL OPINIONS
OF
THE ATTORNEYS GENERAL
OF
THE UNITED STATES
ADVISING THE
PRESIDENT AND HEADS OF DEPARTMENTS
IN RELATION TO
THEIR OFFICIAL DUTIES

EDITED BY
GEORGE KEARNEY

INDEXES AND TABLES BY
EMILY A. SPILMAN

VOLUME 36

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1932

For sale by the Superintendent of Documents, Washington, D. C. - Price \$1.25 (Buckram)

VOLUME 36

CONTAINING

THE OPINIONS OF THE ATTORNEY GENERAL

HON. WILLIAM D. MITCHELL
of Minnesota

AND

OPINIONS BY ACTING ATTORNEYS GENERAL

HON. CHARLES E. HUGHES, JR.
HON. THOMAS D. THACHER
HON. JOHN LORD O'BRIAN

**ALSO CONTAINING CITATIONS OF ACTS OF CONGRESS, THE
UNITED STATES CODE, THE REVISED STATUTES, THE CON-
STITUTION, TREATIES AND CONVENTIONS, OPINIONS
OF THE ATTORNEYS GENERAL, AN INDEX TO
SUBJECTS, AND AN INDEX-DIGEST**

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OPINIONS

OF

HON. WILLIAM D. MITCHELL, OF MINNESOTA

APPOINTED MARCH 4, 1929

CITIZENSHIP—SEAMEN ON AMERICAN VESSELS ENGAGED IN THE OCEAN MAIL SERVICE

Seamen who have filed their declarations of intention to become citizens of the United States and have served three years upon merchant vessels of the United States of more than twenty tons burden, are deemed citizens of the United States within the requirements of section 405 (c) of the Merchant Marine Act, 1928 (45 Stat. 693).

In prescribing that a certain proportion of the crew of vessels employed in ocean mail service under the Merchant Marine Act, 1928, shall be "citizens of the United States," Congress used that phrase as it had itself defined it in applicable existing laws, notably the Naturalization Act.

DEPARTMENT OF JUSTICE,

March 12, 1929.

SIR: I have the honor to acknowledge receipt of your request of November 10, 1928, for my opinion "as to whether seamen who have filed declarations of intention to become citizens of the United States and have served three years upon merchant vessels of the United States of more than twenty tons burden, may be considered citizens within the requirements of section 405 (c) of the Merchant Marine Act of 1928." The pertinent portion of that section reads as follows:

"405 (c). * * * from and after the enactment of this Act and for a period of four years, upon each departure from the United States of a vessel employed in ocean mail service

under this title, one-half of the crew (crew including all employees of the ship other than officers) shall be citizens of the United States and, thereafter, two-thirds of the crew as above defined shall be citizens of the United States." (45 Stat. 693).

Paragraph fourth of section 4 of the Naturalization Act of June 29, 1906 (c. 3592, 34 Stat. 596, 598; U. S. C. title 8, sec. 382), was amended by the Act of May 9, 1918 (c. 69, 40 Stat. 542, 544; U. S. C. title 8, sec. 376), by the addition of the following subdivision:

"Eighth. That every seaman, being an alien, shall, after his declaration of intention to become a citizen of the United States, and after he shall have served three years upon such merchant or fishing vessels of the United States, be deemed a citizen of the United States for the purpose of serving on board any such merchant or fishing vessel of the United States, anything to the contrary in any Act of Congress notwithstanding; but such seaman shall, for all purposes of protection as an American citizen, be deemed such after the filing of his declaration of intention to become such citizen: *Provided*, That nothing contained in this Act shall be taken or construed to repeal or modify any portion of the Act approved March fourth, nineteen hundred and fifteen (Thirty-eighth Statutes at Large, part one, page eleven hundred and sixty-four, chapter one hundred and fifty-three), being an Act to promote the welfare of American seamen."

The Merchant Marine Act, 1928 (45 Stat. 689, 693, 698), does not undertake to define the phrase "citizens of the United States" except in section 703 (b) as to corporations, partnerships, and associations. In using the phrase "citizens of the United States" as to individuals in section 405 (c), Congress used that phrase as it is defined in the Constitution and in existing laws.

Who may be naturalized and upon what conditions and prerequisites, and the extent and scope of the rights conferred by naturalization are matters within the legislative power of Congress. The Naturalization Acts necessarily operate prospectively in so far as they lay down the conditions and prerequisites for acquiring the rights to be conferred. An alien who complies with those conditions and

prerequisites acquires a judicially enforceable right. *Tutun v. United States*, 270 U. S. 568, 578.

The eighth subdivision quoted, *supra*, in the Act of May 9, 1918, is in form and substance an exercise of the constitutional power vested in Congress "to establish an uniform rule of naturalization" of aliens. It is a "substantive feature of the naturalization laws." *In re Lind*, 192 Fed. 209; *In re Sutherland*, 197 Fed. 841. As such, it confers upon this class of aliens one of the rights or incidents of full citizenship; that is to say, wherever American citizenship is a prerequisite for serving as seamen on "any" vessel of the United States, this class of aliens may enter or remain in that service on the same footing as citizens of the United States. This enactment makes them *pro tanto* citizens of the United States.

The eighth subdivision of section 4 of the Naturalization Act, above quoted, and Section 405 (c) of the Merchant Marine Act, 1928, as relates to the crew, are not in terms contradictory nor, in my judgment, inconsistent. Indeed, the former seems, upon a just interpretation, to be a complement of the latter. Section 405 (c), *supra*, is the only existing enactment to which the eighth subdivision, *supra*, can apply. To refuse to apply it there is to render it nugatory and destroy the operation of the Naturalization Act to that extent. To deny aliens who have earned the rights of citizenship conferred by the eighth subdivision, *supra*, of the Naturalization Act, employment as members of the crew of American vessels engaged in the ocean mail service is to put them on the same footing as aliens who have never earned those rights. Plainly that would defeat the liberal policy of our naturalization laws toward a deserving class of seamen without any apparent corresponding benefit to our merchant marine.

It seems if Congress while legislating on the subject of shipping intended to amend or repeal the Naturalization Act, it would not have left such an unrelated purpose to mere inference.

I conclude that in prescribing that members of the crew of vessels employed in ocean mail service under the Merchant Marine Act, 1928, shall be "citizens of the United

States," Congress used that phrase as it had itself defined it in applicable existing laws, notably the Naturalization Act, and, therefore, your question should be answered in the affirmative.

Respectfully,

WILLIAM D. MITCHELL.

To the POSTMASTER GENERAL.

IMMIGRATION—PROCLAMATION BY PRESIDENT OF
NATIONAL ORIGINS QUOTAS

By the Immigration Act of 1924 (43 Stat. 153, 159), the President is required to proclaim on or before April 1, 1929, the national origins quotas which, in accordance with the Act, have been determined and reported to him by the Secretaries of State, Commerce, and Labor.

DEPARTMENT OF JUSTICE.

March 14, 1929.

SIR: I have the honor to acknowledge receipt of your request of March 9, 1929, for an opinion on those provisions of the Immigration Act of 1924 which fix quotas on the basis of national origins. The question submitted is whether the clause that the President shall proclaim the quotas is mandatory, or leaves it to your discretion to issue the proclamation or not, as you deem best. The pertinent sections of the Act are as follows (chapter 190, 43 Stat. 153, 159; U. S. C. title 8, section 211):

"(b) The annual quota of any nationality for the fiscal year beginning July 1, 1927, and for each fiscal year thereafter, shall be a number which bears the same ratio to 150,000 as the number of inhabitants in continental United States in 1920 having that national origin (ascertained as hereinafter provided in this section) bears to the number of inhabitants in continental United States in 1920, but the minimum quota of any nationality shall be 100.

"(c) For the purpose of subdivision (b) national origin shall be ascertained by determining as nearly as may be, in respect of each geographical area which under section 12 is to be treated as a separate country (except the geographical areas specified in subdivision (c) of section 4) the number of inhabitants in continental United States in 1920 whose

origin by birth or ancestry is attributable to such geographical area. Such determination shall not be made by tracing the ancestors or descendants of particular individuals, but shall be based upon statistics of immigration and emigration, together with rates of increase of population as shown by successive decennial United States censuses, and such other data as may be found to be reliable.

“(d) For the purpose of subdivisions (b) and (c) the term ‘inhabitants in continental United States in 1920’ does not include (1) immigrants from the geographical areas specified in subdivision (c) of section 4 or their descendants, (2) aliens ineligible to citizenship or their descendants, (3) the descendants of slave immigrants, or (4) the descendants of American aborigines.

“(e) The determination provided for in subdivision (c) of this section shall be made by the Secretary of State, the Secretary of Commerce, and the Secretary of Labor, jointly. In making such determination such officials may call for information and expert assistance from the Bureau of the Census. Such officials shall, jointly, report to the President the quota of each nationality, determined as provided in subdivision (b), and the President shall proclaim and make known the quotas so reported. Such proclamation shall be made on or before April 1, 1927. If the proclamation is not made on or before such date, quotas proclaimed therein shall not be in effect for any fiscal year beginning before the expiration of 90 days after the date of the proclamation. After the making of a proclamation under this subdivision the quotas proclaimed therein shall continue with the same effect as if specifically stated herein, and shall be final and conclusive for every purpose except (1) in so far as it is made to appear to the satisfaction of such officials and proclaimed by the President, that an error of fact has occurred in such determination or in such proclamation, or (2) in the case provided for in subdivision (c) of section 12. If for any reason quotas proclaimed under this subdivision are not in effect for any fiscal year, quotas for such year shall be determined under subdivision (a) of this section.”

By Joint Resolution of March 4, 1927 (chapter 514, 44 Stat. 1455), the Congress amended the Act by substituting 1928 for 1927, and on March 31, 1928, passed a second resolution

(chapter 306, 45 Stat. 400) substituting 1929 for 1928, thus providing that the proclamation shall be made on or before April 1, 1929.

The Secretary of State, the Secretary of Commerce, and the Secretary of Labor, acting jointly, have determined the national origins of the inhabitants of the United States in 1920, and have computed quotas, as provided in the Act. On February 26, 1929, they made their report to you as provided in the Act. Thus in the manner provided by the Act, the quotas have been computed and Congress has fixed the time when they shall become operative. The three Secretaries were charged with the duty of making the computation, and to the President has been given only the function of proclaiming the result. The action of the President is hardly more than an authentication of the findings of the three Secretaries. The proclamation makes formal public record of those findings.

The national origins clauses were inserted when the bill was pending in the Senate. When it went to conference it provided that the three Secretaries should compute and proclaim the quotas, and it required no action by the President. In conference a clause was inserted requiring the President to issue the proclamation, thus making a public record of the findings of the Secretaries.

The Act, as amended, provides that the determination of the quotas shall be made by the three Secretaries, and that they shall jointly report to the President, and that "the President shall proclaim and make known the quotas so reported." It also directs that the proclamation "shall be made on or before April 1, 1929." So far, these directions are absolute in terms and leave to the officers named no option to refrain from executing them.

Then follow two sentences which deal with the situation which would arise should the proclamation not be made on or before the date specified. One is: "If the proclamation is not made on or before such date, quotas proclaimed therein shall not be in effect for any fiscal year beginning before the expiration of 90 days after the date of the proclamation." The other is: "If for any reason quotas proclaimed under this subdivision are not in effect for any fiscal year, quotas for such year shall be determined under subdivision (a) of this section."

These provisions recognized the possibility that the proclamation might not be made on or before the date specified, but they do not, in my opinion, show an intention to give to the President a discretion to refrain from making the proclamation after the three Secretaries have made a determination and report in accordance with the Act.

The provisions as to what shall be the result if the proclamation is not made within the time specified seem to have been inserted as a safeguard against the elimination of all quota restrictions should it develop that the computation could not be made by the three Secretaries within the time limited, because of lack of necessary statistical or other information. This is borne out by what appears in the Congressional Record and the Reports of Congressional Committees.

When the Act was passed, and afterwards, there existed some doubt as to whether the prescribed formula for computing the quotas was practicable, and whether a determination of national origins could be made as directed. On June 4, 1924, Mr. Johnson, Chairman of the House Committee on Immigration, said:

"It is expected that the ascertainment of 'national origin quotas' will be a work of no small magnitude. Hence the new law directs that it shall not be operative immediately. The preliminary work is to be done by 1927, the quotas are to be announced by the President on April 1 of that year, and from and after July 1, 1927, they are to be effective as superseding quotas based upon the 1920 census.

"If for any reason the national origin plan can not be satisfactorily worked out, the President need not issue the required proclamation and the quota law will then remain until changed by Congress." (65 Cong. Rec. 10512.)

On June 29, 1926 (67 Cong. Rec. 12299), in speaking of the Act, he further said:

"It must be clear that, upon the adoption of the 'national origins provision' by the Senate and House conferees in 1924, consideration was given the possibility that ascertainment of 'national origins' might not be feasible, and the above language was employed to provide authority for the continuance of existing quotas in such a contingency."

That a difficulty did arise in making the computations before the date originally fixed is disclosed by the joint letter of the three Secretaries, transmitted to the Senate by the President on January 10, 1927, in which it was said:

"Although this is the best information we have been able to secure, we wish to call attention to the reservations made by the committee and to state that in our opinion the statistical and historical information available raises grave doubts as to the whole value of these computations as a basis for the purposes intended. We therefore can not assume responsibility for such conclusions under these circumstances."

Again, at the time of the passage of the Joint Resolution postponing the operation of the national origin quotas from 1927 to 1928, in the report of the House Committee on Immigration and Naturalization (H. Rep. 2260, 69th Congress, 2d session) it was said:

"It is agreed that the bases upon which national origins quotas have been preliminarily computed are unsatisfactory, and there appears grave doubt that they can be established with such certainty and definiteness as to justify their employment."

These references tend to confirm the conclusion that Congress had in mind a failure of the President to issue the proclamation as a result of the failure or inability of the Secretaries to determine national origins and compute quotas by the methods prescribed in the Act. Examination of the proceedings in the Congress and of Committee Reports, relating to the original Act and the joint resolutions postponing its operation, has failed to disclose any suggestion that it was the intention to confer on the President discretionary power in the matter, and in all its proceedings the Congress seems to have acted on the assumption that the President was required to proclaim the findings of the Secretaries, unless Congress by legislation directed a postponement.

The duty of determining national origins and computing the quotas is vested entirely in the three Secretaries. The law contemplates that if they succeed in the performance of this task and make definite determination of the quotas by the methods prescribed by the Act and report them to the President, his function will be merely to make formal

proclamation of the result. The report of the three Secretaries dated February 26, 1929, shows that they have performed the duties imposed upon them. While the report states that they do not express any opinion on the merits or demerits of this system of arriving at the quotas, it does not suggest that they have found it impossible to make the computation by the methods prescribed in the Act. On the contrary, they have submitted definite findings and have definitely determined the quotas.

A further reason exists for construing the Act to require the President to make the proclamation if the Secretaries make the report. In *Field v. Clark*, 143 U. S. 649, 692, it was said:

“That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”

Congress may delegate a power to determine some fact or state of facts upon which, when determined, the law will operate. It proceeded in that way in this case by delegating to the three Secretaries the power to determine the facts upon which the operation of the quota provisions depends. See *Hampton & Co. v. United States*, 276 U. S. 394.

Construed as I think it should be, this statute conforms to these rules, and constitutional difficulties are avoided. If the Act should be construed to give the President discretion to refrain from proclaiming the quotas fixed by the report of the Secretaries, it would come dangerously close to if it did not pass the constitutional limit on delegation of powers. If the Act gives the discretion to the President to refrain from putting the national origins quotas into operation by refraining from proclaiming them after their determination by the Secretaries, that discretion is absolute because the Act does not lay down any principle or rule to guide the exercise of the discretion, nor does it make its exercise depend upon any prescribed conditions or state of facts. So construed, the Act would result in an absolute delegation to the President of the power to say whether the national origins shall be the basis for the quotas. It would be difficult to sustain the Act so construed against the charge of delegation of legislative power to the executive. The courts uni-

formly endeavor so to construe statutes as to avoid serious constitutional questions, and that should be done here.

For the reasons stated, I am of the opinion that you have no choice in the matter, and are required by this statute to proclaim on or before April 1, 1929, the quotas which have been determined and reported to you by the three Secretaries.

Respectfully,

WILLIAM D. MITCHELL.

To the PRESIDENT.

EMPLOYMENT OF MINORS IN GOVERNMENT PRINTING
OFFICE

The Act of May 29, 1928 (45 Stat. 998), regulating the employment of minors within the District of Columbia, is not applicable to minors employed in the Government Printing Office.

DEPARTMENT OF JUSTICE,

April 10, 1929.

SIR: I have the honor to comply with your request of March 2, 1929, for my opinion, upon a question submitted by the Public Printer, as to whether or not the Act of May 29, 1928, c. 908, 45 Stat. 998, regulating the employment of minors within the District of Columbia, is applicable to minors employed in the Government Printing Office.

Generally, and with exceptions not here pertinent, that Act provides "That no child under 14 years of age shall be employed, permitted, or suffered to work in the District of Columbia, in, about, or in connection with any gainful occupation"; forbids the employment of any minor in any place or at any employment dangerous or prejudicial to life, health, safety, or welfare, as determined by orders of the Board of Education of the District of Columbia; prohibits the employment of minors between specified ages in certain named occupations; and prescribes authorized hours of labor.

The prospective employer of a minor under 18 years of age must first procure from the director of the Department of School Attendance of the District of Columbia a "work permit," which may be issued upon a consideration of such things as the nature of the work, the hours of employment, the age of the child, his educational attainments, physical

condition, etc. The employer must post notices and regulations and keep accurate records of the beginning and end of each day's labor, including the meal period, for each minor employed by him. These records, permits, and the places of employment shall be accessible to the director and his agents, who may enter and inspect at any time and as often as necessary.

Violations are punishable by fine and imprisonment, and by refusal to issue further permits to the guilty employer. The employer, upon demand, shall produce evidence of age of an employee believed to be a minor and unlawfully employed, and failure thereof shall be *prima facie* evidence of the violation.

Primarily, this is a local regulation reported to Congress as a companion measure to the compulsory school attendance law (Act February 4, 1925, c. 140, 43 Stat. 806) and intended "to so regulate the labor of children that they may come to school in fit condition to benefit from the instruction provided." H. Rept. 703, S. Rept. 842, 70th Congress, 1st session. The purpose of the bill was thus stated:

"House bill 6685 was drafted to remedy the weaknesses of the present child-labor law and to give the children of the District of Columbia a measure of protection from working conditions detrimental to their health, education, and general well-being, equal to that which is given children in the majority of the States."

The general rule is that the sovereign is not included unless expressly named. 33 Op. 355. In that opinion the Attorney General held that the Act of February 24, 1914, c. 28, 38 Stat. 291, regulating the hours of employment of females in the District of Columbia, "makes no reference to the Government of the United States and, therefore, is not applicable to the employment of female help by the Government." As therein pointed out, other statutes prescribe the hours of employment in the Federal service.

The same considerations apply here, and it may be remarked that if the statute were held applicable it would apparently accomplish nothing of substance. The hours of labor required, by existing regulations, of minors in the Government Printing Office are no more arduous than those which the statute would permit. The Civil Service Commis-

sion examines and certifies minors (messengers and apprentices) appointed in the Government Printing Office, and, by regulations, which have the force of law, prescribes minimum requirements with respect to age, education, and physical condition equally as high as those of the statute. Many of the appointees come from distant States. It could not reasonably be intended that, upon arrival here, they shall be reexamined by the Department of School Attendance, sitting thus in review upon the determination of the Civil Service Commission. Altogether the statute seems peculiarly inappropriate of application to the Federal Civil Service.

My opinion, therefore, is that the Act of May 29, 1928, is not applicable to minors employed in the Government Printing Office.

Respectfully,

WILLIAM D. MITCHELL.

To the PRESIDENT.

ELIGIBILITY OF MR. MELLON FOR THE OFFICE OF SECRETARY OF THE TREASURY

The head of an Executive Department, with the exception of the Postmaster General, may legally continue to hold his office after the expiration of the term of the President by whom he was appointed at the pleasure of the President for the time being.

Under the statutory provision set forth in Senate Resolution 2, 71st Congress, special session, Mr. Andrew W. Mellon is not disqualified from holding the office of Secretary of the Treasury.

DEPARTMENT OF JUSTICE,

April 18, 1929.

SIR: By letter of March 9, 1929, sent at your direction, your Secretary forwarded to me a copy of Senate Resolution 2 of the special session of the Senate of the Seventy-first Congress, with the request that I give you my opinion on the questions involved. These questions were:

"1. Whether the head of any department of the Government may legally hold office as such after the expiration of the term of the President by whom he was appointed.

"2. Whether in view of the provisions of the laws of the United States Andrew W. Mellon may legally hold the office of Secretary of the Treasury, reference being made to sec-

tion 243 of Title 5 of the Code of Laws of the United States," which is set forth in full,
"and to section 63 of Title 26 of the Code of Laws of the United States,"
also set forth in full. These questions will be discussed in order.

I assume that the words "the head of any department of the Government" are intended to refer to the heads of the Executive Departments, which together are commonly called the Cabinet, and shall treat the question on that assumption. I have no doubt whatever that the head of each of these departments, with the exception of the Postmaster General, whose case is governed by a special statute, may continue to hold the office to which he has been appointed, after the expiration of the term of the President by whom he was appointed and as long as the incumbent of the office of President wishes him to serve.

While the President may, at pleasure, remove any executive officer, and while Congress may limit the term for which any executive officer may be appointed (*Myers v. United States*, 272 U. S. 52, 129), there is no provision in the Constitution which limits the term to which the head of a department may be appointed, nor, except in the case of the Postmaster General, is there at the present time any statute which fixes any limit.

As the statutes creating these offices do not otherwise provide for the making of appointments thereto, Article II, section 2, of the Constitution empowers the President to make the appointments by and with the advice and consent of the Senate. As no term of office is fixed, the commissions may authorize the officer to hold office during the pleasure of the President (1 Op. 212), and this does not mean merely the President who made the appointment, but includes the incumbent of the position at any time thereafter. (2 Op. 410.)

The practical construction given to the commissions issued to heads of Executive Departments seems to have been uniform since 1789 to the effect that a commission does not expire on the death of a President nor at the end of a President's term of office. In 1831 Attorney General Berrien, in

an opinion to the Secretary of the Treasury, discussed this subject at considerable length. (2 Op. 410.) In the course of his opinion he referred to the English common law principle that commissions granted by the King expired on the King's demise, the theory being that the King was the fountain of dignity and honor and that it was his prerogative to issue all commissions. Such a theory, he said, did not apply to our institutions. In this country the President is the appointing power, but it is in the people alone that sovereignty resides. He pointed out that the commissions actually issued have been "during the pleasure of the President for the time being" and said:

"This form of issuing the commission serves to show the practical interpretation of this doctrine, which has prevailed since the foundation of this Government."

He sums up his conclusion as follows (p. 412):

"When an office is held during the pleasure of any designated officer, it is at the pleasure of the *officer*, and not of the *individual*; and to determine that office otherwise than by the act of the immediate incumbent, there must be some official act indicative of the will of the officer at whose pleasure it is held. If he ceases his official functions, without having done any act indicative of his will, his appointee must necessarily hold over until a successor is appointed, who is vested with a like discretion."

Historically, it seems to have been generally agreed that upon the death of the President or the expiration of his term no reappointment or new commission was necessary in the case of such officers as the new President wished to retain. There are many instances of such officers holding over under different Presidents, some of which will be mentioned hereafter as illustrations. In the absence of any constitutional or statutory provision to the contrary, and in view of the practical construction, beginning with the foundation of the Government, I can see no ground to support the view that upon the termination of one administration the President is required to submit to the Senate for confirmation the names of those then occupying positions as heads of executive departments whom he wishes to continue in office, except in the case of the Postmaster General. With respect to the latter officer, the Act of June 8, 1872 (ch. 335,

17 Stat. 283), an Act to review, consolidate, and amend the statutes relating to the Post Office Department, contained in section 2 a provision that the term of the office of the Postmaster General should be for and during the term of the President by whom he was appointed "and for one month thereafter unless sooner removed." That provision was carried into section 388 of the Revised Statutes and is now section 361 of Title V of the United States Code. The tenure of the Postmaster General, therefore, is peculiar.

Secretary Mellon's commission by its terms authorizes him to hold office "during the pleasure of the President of the United States for the time being," and this has been the usual form of commissions of this character from the beginning of the Government. It is unnecessary to mention them all, but the following illustrations show the practical construction which has been placed upon the question of duration of tenure of the heads of the executive departments:

Mr. Pickering was commissioned Secretary of State on December 10, 1795, and continued to hold that office until May 12, 1800, without a new commission being issued under President Adams. So, also, Secretary of the Treasury Wolcott, Secretary of War McHenry, Attorney General Lee, and Postmaster General Habersham, commissioned by President Washington in his second term, continued into and through the administration of President John Adams without new commissions.

Mr. Gallatin served as Secretary of the Treasury from January 26, 1802, until February 9, 1814, under one commission. So, also, Mr. Madison served as Secretary of State from March 5, 1801, until March 3, 1809, with but one commission. All the members of President Jackson's Cabinet who were in office when his term expired continued to serve under President Van Buren without new commissions.

Though not strictly within the terms of the question, it may be noted that the members of the Cabinets of Presidents William Henry Harrison, Lincoln, Garfield, and McKinley continued to serve under the succeeding President without new commissions.

It seems too clear to admit of doubt that, with the exception of the Postmaster General, all heads of departments

continue to hold office from the time they are commissioned until death, resignation, or removal ends their tenure.

The second question involves the construction of section 243, Title V, United States Code, which provides:

“No persons appointed to the office of Secretary of the Treasury, or Treasurer, or Register, shall directly or indirectly be concerned or interested in carrying on the business of trade or commerce, or be owner in whole or in part of any sea vessel, or purchase by himself, or another in trust for him, any public lands or other public property, or be concerned in the purchase or disposal of any public securities of any State, or of the United States.”

The section contains other provisions not now material, and makes every person who violates its provisions guilty of a high misdemeanor, and, upon conviction, imposes the penalty of removal from office and disqualification for holding thereafter any office under the United States.

The facts with respect to Mr. Mellon's business activities, as explained in the papers submitted to me, show that while he owned stock in a number of corporations, before becoming Secretary of the Treasury he ceased to be an officer or director in any of them, and in none of them does he own a majority of the stock, nor does he give his time or attention to the active conduct of any incorporated business. The question comes down to the single one whether the statute quoted makes it unlawful for the Secretary of the Treasury to be a stockholder in any corporation engaged in trade or commerce.

Section 243 originated in the Act of September 2, 1789 (ch. 12, sec. 8, 1 Stat. 65, 67), the Act creating the Treasury Department. Though referred to in *Ex parte Curtis*, 106 U. S. 371, 373 (4 Op. 555, 25 Op. 98), there seems to be no authority which tends to throw a clear light upon the precise meaning and application which it was intended to have. The discussion, if any, which attended its adoption is not reported in the Annals of Congress or in Maclay's Journal.

The papers submitted to me contain an opinion by William S. Morehead, Esq., dated April 2, 1924, given to Secretary Mellon, and also one by Messrs. Faust & Wilson, dated January 25, 1921, given to Senator Knox, and read into the

Congressional Record by Senator Reed, of Pennsylvania. Each reaches the conclusion that there is nothing in the statute which disqualifies Mr. Mellon from holding the office of Secretary of the Treasury because of his ownership of corporate stocks. They are based upon judicial decisions which support the principle, now well established, that the ownership of stock in a corporation does not constitute carrying on the business of the corporation. Among them are *In re Deuel*, 127 App. Div. 640, holding that Judge Deuel was not disqualified to hold the office of Justice of the Court of Special Sessions of the State of New York under a statute which forbade such a Justice to "carry on any business." Judge Deuel was vice president of a publishing corporation, but the court held that this did not offend the statute, as the term carrying on business implied "such a relation to the business as identifies the person with it, and imposes upon him some duty or responsibility in connection with its management."

A similar case is *In re Levy*, 198 App. Div. 326, which held that Judge Levy, a stockholder but not a director or officer of any corporation, had not offended against a statute which said that no Justice shall "engage in any other business or profession."

In the case of *Cooper Manufacturing Co. v. Ferguson*, 113 U. S. 727, 734, the Supreme Court, in construing the phrase "to carry on," said:

"The meaning of the phrase 'to carry on' when applied to business is well settled. In Worcester's dictionary the definition is: 'To prosecute, to help forward, to continue, as to carry on business.' The definition given to the same phrase in Webster's dictionary is: 'To continue, as to carry on a design; to manage or prosecute, as to carry on husbandry or trade.'"

There are other cases which need not be mentioned. Any doubt which might exist seems to be solved by the decision of the Supreme Court in *United States v. Delaware & Hudson Co.*, 213 U. S. 366, which arose under the so-called commodities clause of the Hepburn Act of June 29, 1906 (ch. 3591, 34 Stat. 584), which made it unlawful for any railroad company to transport in interstate or foreign commerce—

“any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.”

The Court held that this statute did not prohibit a railroad company from transporting articles or commodities “manufactured, mined, produced, or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder.” (213 U. S. 415.) In reaching that conclusion Mr. Justice White, delivering the opinion of the Court, analyzed at length the purpose of the statute as shown by its language and construed in the light of the circumstances existing at the time of its passage, and held that its object was to prevent carriers engaged in interstate commerce from being associated in interest at the time of transportation with the commodities transported. Such being its purpose, he held that the ownership of stock in a producing company by a railway company did not establish a legal interest in the commodity manufactured by the producing corporation, and therefore did not offend against the statute. Any doubt which might exist seems to me to be laid at rest by this decision. The purpose of the statute as declared by the Court, and the holding of the Court in the light of the purpose as thus declared, when compared make it plain that the effect of the decision is that stock ownership in a corporation does not in contemplation of law give the stockholder any interest direct or indirect in the business which the corporation is carrying on.

While the forms of corporate investment familiar at the present time were comparatively uncommon in 1789, there were classes of people who derived an income from invested funds in contrast to those whose income was derived from operations of trade and commerce. I think we can say with assurance that the words of the statute would not be deemed by those who wrote it as appropriate words to describe one who simply received dividends from stocks which he owned and took no active part in the management or control of the corporations which issued them.

My conclusion is that Secretary Mellon is not disqualified from holding the office of Secretary of the Treasury by reason of the fact that he owns stock in business corporations. To give the statute any other construction would be to sacrifice the spirit to the letter, and under modern conditions would probably exclude from the office a great majority of the men most competent to hold and administer it efficiently without accomplishing any good.

Congress has not found occasion to amend the Act we are now considering by inserting any provision prohibiting stock ownership. In 1913, however, in enacting the Federal Reserve Act, it provided specifically that no member of the Federal Reserve Board should hold stock in any bank, banking institution, or trust company. (38 Stat. 261.) When, however, it enacted the Federal Farm Loan Act (in 1916; 39 Stat. 360) it provided that no member of the Federal Farm Loan Board should be an officer or director of any other institution, association, or partnership engaged in banking or in the business of making land-mortgage loans or selling land mortgages, but did not mention stock ownership. This may not be important, but it shows that Congress has had in mind the question of stock ownership as affecting a man's eligibility to hold certain offices, and, when it has deemed such ownership improper, has prohibited it.

The third question arises under Section 63 of Title XXVI, United States Code, as follows:

"SEC. 63. Interest in certain manufactures or production of liquors by revenue officers prohibited.—Any internal-revenue officer who is or shall become interested, directly or indirectly, in the manufacture of tobacco, snuff, or cigars, or in the production, rectification, or redistillation of distilled spirits, shall be dismissed from office; and every officer who becomes so interested in any such manufacture or production, rectification, or redistillation, or in the production of fermented liquors, shall be fined not less than \$500 nor more than \$5,000. The provisions of this section shall apply to internal-revenue agents as fully as to internal-revenue officers."

The essential facts are set forth in the statement which Senator Reed, of Pennsylvania, made in the Senate on

March 31, 1924 (65 Cong. Rec., pt. 5, pp. 5243-5249), and in an open letter by Mr. Mellon to Senator Caraway, dated October 2, 1928. It appears that at one time he held a partnership interest in a firm which distilled whisky, but that the operation of that firm ceased completely on December 15, 1916, and before March 4, 1921, the entire property of the firm was conveyed to a trustee under an irrevocable trust, with full authority in the trustee to dispose of the property, free from any control by those who were members of the partnership, but without power to operate the distillery. At the time Senator Reed made his statement the trustee had in its possession a considerable quantity of whisky, but the letter of October 2, 1928, to Senator Caraway states:

"The trustee executed the trust by disposing of the real estate, stock in hand, and other property in its entirety."

It is therefore clear that even if the Secretary of the Treasury is an "internal-revenue officer" or an "internal-revenue agent" within the meaning of the statute, he has not been at any time since he became Secretary of the Treasury interested directly or indirectly in the "production, rectification, or redistillation of distilled spirits." This question does not call for further discussion. Even if Mr. Mellon had continued to own the whisky, the mere ownership of it in a warehouse could hardly be called production, rectification, or redistillation.

It is my opinion, therefore, and I so advise you: First, that the head of an Executive Department, with the exception of the Postmaster General, may legally continue to hold his office after the expiration of the term of the President by whom he was appointed at the pleasure of the President for the time being; and, second, that Secretary Mellon is not disqualified from holding the office of Secretary of the Treasury under the statutory provision set forth in the Senate Resolution by reason of any facts within my knowledge.

Respectfully,

WILLIAM D. MITCHELL.

To the PRESIDENT.

COPIES OF TELEGRAMS AND CABLEGRAMS RELATING TO
INTERNATIONAL TRANSACTIONS IN NARCOTIC DRUGS

The Secretary of the Treasury has no power to require by regulation telegraph and cable companies to deliver to the Federal authorities for transmission to foreign countries copies of telegrams and cablegrams which are suspected of being prepared in connection with illicit international transactions in narcotic drugs.

The Attorney General is not authorized to render an opinion upon the question whether there would be any constitutional objection to the enactment by Congress of legislation requiring telegraph and cable companies to furnish to the Government for transmission to foreign countries copies of telegrams and cablegrams relating to the smuggling of narcotic drugs, because the question is hypothetical; and also because the Secretary is not required to determine the constitutional power of Congress in such legislative field.

DEPARTMENT OF JUSTICE,
April 19, 1929.

SIR: I have the honor to respond to your request of February 15 for my opinion with respect to the power of your Department to require by regulation or under appropriate legislation "privately owned telegraph and cable companies in this country to deliver to the Federal authorities copies of telegrams and cablegrams filed with them for transmission when such telegrams or cablegrams are suspected of being prepared in connection with an illicit international transaction in narcotic drugs." You call attention to your communication requesting an opinion of your Solicitor, as furnishing "in detail the circumstances which have given rise to the questions propounded." That communication, so far as pertinent here, reads as follows:

"Your attention is invited to the fact that under the International Opium Convention of 1912 which together with final protocol thereto was ratified by the United States and proclaimed March 3, 1915, this country has assumed obligations together with some 52 other powers to pursue progressive suppression of the abuse of opium, morphine and cocaine as well as drugs prepared or derived from these substances giving rise or which may give rise to analogous abuses. Since the creation and functioning of the League of Nations, the duties imposed upon the Netherlands Government under the said Convention have almost wholly been transferred to

and assumed by the Council of the League of Nations which is aided in this duty by the Advisory Committee on the Traffic in Opium and Other Dangerous Drugs which assembles at Geneva semi-annually for this purpose. At the last session of the Committee, which may be designated its Eleventh Session, held at Geneva from April 12 to 26, 1928, a resolution was adopted urging that the various Governments should upon proper application take steps to furnish to another country facsimiles of telegrams or cablegrams sent in connection with a smuggling transaction in narcotic drugs together with the names of and other particulars relating to the persons sending them. The resolution includes the suggestion that if the power to enter into this arrangement does not exist at present the several Governments should, if possible, obtain such power, and the resolution by direction of the Council of the League was transmitted to this Government under date of July 7, 1928, copy of the communication from the Acting Secretary General of the League being enclosed. There is also enclosed a copy of a communication from the State Department under date of September 28, 1928, transmitting the document and requesting an expression of opinion concerning the desirability of endeavoring to bring about legislation which would enable the United States Government in fulfillment of its obligations under the International Opium Convention of 1912 to furnish copies of telegrams of the nature referred to in the resolution.

"It may be stated at this point that the adoption of this resolution by the Advisory Committee was due to an incident which occurred in the course of an investigation made by Federal narcotic enforcement officers in New York City of an illicit importation in July, 1926, of more than 200 pounds of narcotic drugs which arrived on the S. S. *Arabic* from Hamburg. Effort was made at the time to secure the original or facsimiles of certain cablegrams which had been filed in Hamburg for transmittal to suspected smugglers in New York, but the German authorities refused to furnish the desired documents except (1) pursuant to a court order and (2) provided the United States would agree to reciprocate in the same manner should the German authorities make a

like request in the future. These conditions could not be met and the officers were unable to complete that portion of the investigation, but the matter was taken up with the Advisory Committee and resulted in the resolution mentioned.

“Prior to considering the desirability of entering into such an arrangement it seems necessary to consider first whether the Department has power at present by regulation, to require privately owned telegraph or cable companies in this country to deliver copies of suspected telegrams and cablegrams filed with them for transmission, to the Federal authorities for the preparation of facsimiles and whether such companies may be required to give upon request any information they may possess relative to the names of and other particulars relating to the persons sending said telegrams or cablegrams. Secondly, it becomes necessary to consider, if the Department has not the power to require these documents and this information by regulation (and it is thought that it has not), whether there would be any constitutional objection to the enactment by Congress of legislation requiring the companies to furnish the documents and information upon request of this Department. The second question is admittedly rather broad in scope and it may be that some limitation upon the right to demand telegrams and cablegrams from the custody of the companies may remove possible constitutional objections which would be applicable if Congress attempted to give the Department power to ask for any and all copies of telegrams and cablegrams indiscriminately. For instance, it may be that some showing of probable cause to believe that the cablegram is connected with an illicit smuggling transaction would have to be made before the Department would be justified in making its demand, although such a requirement would render the arrangement of doubtful value from an enforcement standpoint since more frequently there would be a strong suspicion existing rather than a definite showing of probable cause as the smugglers themselves are extremely shrewd and telegrams and cablegrams would doubtless be in code which would have to be deciphered before Government officers could ascertain whether or not they concerned a smuggling transaction.”

Thus the question you are apparently seeking to solve is whether you have the authority to require by regulation the furnishing by telegraph and cable companies of copies of certain described telegrams and cablegrams in order that such copies may be turned over to the foreign country interested under the terms of the resolution adopted by the Advisory Committee of the Council of the League of Nations.

It is observed that in your letter to the Solicitor you express the view that you do not have such power, and the Solicitor's reply confirms the correctness of that view.

The only statute which undertakes to deal restrictively with the subject of exportation of narcotic drugs, and it is concerning such exports that the telegrams and cablegrams are desired by the foreign countries of destination, is the Narcotic Drugs Import and Export Act of February 9, 1909, c. 100, 35 Stat. 614 as amended by the Act of January 17, 1914, c. 9, 38 Stat. 275, and as amended by the Act of May 26, 1922, c. 202, 42 Stat. 596 (U. S. C. Title 21, Secs. 171 et seq.). The only provision of the Act conferring power to make regulations is contained in section 6 (c), and reads as follows:

"The board shall make and publish all proper regulations to carry into effect the authority vested in it by this Act."

An examination of the Act fails to reveal any authority or duty conferred upon the board, viz, the Federal Narcotics Control Board created by the Act, to obtain and furnish to foreign countries such information as that concerning which you inquire.

Moreover, with its attention directed to what information it would seek from foreign countries bearing upon the subject, Congress merely provided in section 6 (b) of the Act as follows:

"The Secretary of State shall request all foreign Governments to communicate through the diplomatic channels copies of the laws and regulations promulgated in their respective countries which prohibit or regulate the importation and shipment in transit of any narcotic drug and, when received, advise the board thereof."

It is also to be observed that the International Opium Convention of January 23, 1912, 38 Stat., pt. 2, p. 1929, to carry into effect which, the Narcotic Drugs Import and

Export Act was enacted, sets forth in Article 21 the items of exchangeable information as follows:

"The Contracting Powers shall communicate to each other, through the Netherlands Ministry for Foreign Affairs:

"*a.* The text of the laws and the administrative regulations in existence which concerns matters aimed at by the present convention or enacted by virtue of its clauses;

"*b.* Statistical information with respect to that which concerns the traffic in raw opium, prepared opium, morphine, cocaine and their respective salts, as well as all other drugs or their salts or preparations aimed at by the present Convention.

"These data shall be furnished with as much detail and in as short a time as shall be deemed possible."

Neither in the Convention nor in its companion legislation is there any provision for the procuring and furnishing to other countries of evidence which will enable such countries to proceed against persons or narcotics within their respective jurisdictions. It would therefore follow that any regulations seeking to compel telegraph and cable companies to furnish copies of telegrams and cablegrams, such as you describe for transmission to the authorities of the countries interested, would be additive to the Narcotic Drugs Import and Export Act, *supra*, and therefore invalid. *United States v. George*, 228 U. S. 14, 21-22, and *Williamson v. United States*, 207 U. S. 425, 461-462. It may be added that I know of no other statute that could be construed to confer such power upon you.

Your second question inquires whether there would be any constitutional objection to the enactment by Congress of legislation requiring telegraph and cable companies to furnish upon your request copies of such messages as you describe. On that question, I would not be authorized to express a view. The question is hypothetical in that it can not now be determined whether Congress would enact such a statute, or what its final form might be. It is likewise true that you are not required to determine the constitutional power of Congress in such legislative field. 23 Op. 582, 584.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE TREASURY.

GOVERNMENT SPECIFICATIONS FOR SHEET AND PLATE
IRON AND STEEL

In the preparation of specifications for the purchase by Government Departments and independent bureaus, of sheet and plate iron or steel, whether black or galvanized, or otherwise coated, it is not mandatory that the specifications therefor shall conform to the standard gauge prescribed by the Act of March 3, 1893 (27 Stat. 746).

There is nothing in the Act of March 3, 1893, *supra*, or in any other Act of Congress which precludes the Federal Specifications Board, in the preparation of specifications for the purchase of iron or steel sheets or plates, from specifying that all base iron or steel sheets or plates shall comply with the standard gauge established by said Act, regardless of the protective coating of other metal, or the thickness or weight thereof, which may be specified.

DEPARTMENT OF JUSTICE,

April 22, 1929.

SIR: I have the honor to respond to your request for an expression of my opinion concerning the application of the Act of March 3, 1893, c. 221, 27 Stat. 746, to Government specifications for sheet and plate iron and steel, black or galvanized. It is stated in a memorandum accompanying your request that answers are desired to the following specific questions:

“(1) As to whether in the preparation of specifications for the purchase by all Government Departments and independent bureaus of sheet iron or steel, galvanized or otherwise coated, the basic metal must be made to conform to the U. S. Standard gauge prescribed by the Act of March 3, 1893, so that the total weight of the finished sheet shall be that of the standard weight of each gauge plus the weight of coating specified; or whether the U. S. Standard gauge applies in any way to sheet iron or steel when galvanized or otherwise coated, so far as the United States Government Master Specifications are concerned.

“(2) If it is held that the Act of March 3, 1893, does not apply to basic black sheets for coating with protective metals, whether there is anything in this Act, or is there any other Act or law which precludes the Federal Specifications Board from setting up the fundamental and basic rule that all base iron or steel sheets for coating with protective coats of zinc, lead and tin, tin, nickel, chromium, or any other

protective coating shall be U. S. standard gauge, the finished weights of coated sheets varying according to the weight of protective coating applied."

The Act of March 3, 1893, *supra*, omitting the table of standards, reads as follows:

"That for the purpose of securing uniformity the following is established as the only standard gauge for sheet and plate iron and steel in the United States of America, namely:"

(Here follows a table of gauge numbers giving the thickness and the weight per square foot and square meter of each gauge.)

"And on and after July first, eighteen hundred and ninety three, the same and no other shall be used in determining duties and taxes levied by the United States of America on sheet and plate iron and steel. But this act shall not be construed to increase duties upon any articles which may be imported.

"SEC. 2. That the Secretary of the Treasury is authorized and required to prepare suitable standards in accordance herewith.

"SEC. 3. That in the practical use and application of the standard gauge hereby established a variation of two and one-half per cent, either way may be allowed."

Compliance with the standard gauge established by the above Act is not made mandatory either upon American manufacturers or upon the Government Departments in preparing their specifications for sheet and plate iron and steel. The only mandatory provision in the Act is that the standard gauge therein established "shall be used in determining duties and taxes levied by the United States of America on sheet and plate iron and steel." There is no prohibition against the importation of sheet and plate iron or steel not complying with the standard gauge, but it is provided merely that the standard shall be followed in determining the duties and taxes levied thereon.

In certain Acts subsequently enacted for standardization purposes the Congress has sought to make mandatory the use of the standards therein provided. The Act of March 4, 1915, c. 158, 38 Stat. 1186, to fix the standard barrel for fruits, vegetables, etc., provides that it shall be unlawful to sell or

offer for sale, "or to ship from any State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or to a foreign country, a barrel containing fruits or vegetables or any other dry commodity of less capacity than the standard barrels defined in the first session of this Act, * * *"

The Act of July 18, 1918, c. 156, as amended by Act of March 3, 1919, c. 96, 40 Stat. 912, 1291, for the standardization of screw threads, provides for the appointment of a commission to ascertain and establish standards for screw threads, and to report such standards to the Secretaries of War, Navy and Commerce for their approval. The Act further provides: "Such standards, when thus accepted and approved, shall be adopted and used in the several manufacturing plants under the control of the War and Navy Departments, and, so far as practicable, in all specifications for screw threads in proposals for manufactured articles, parts, or materials to be used under the direction of these departments."

The Act of March 3, 1893, however, contains no such mandatory features. While the Government Departments, in preparing specifications for the purchase of sheet and plate iron and steel, may adhere to the standard gauge established by the Act of March 3, 1893, it is not necessarily incumbent upon them to do so.

In view of the fact that metal coatings on sheet and plate iron or steel vary in thickness and weight according to the amount applied, and as manufacturers of sheet and plate iron or steel do not always apply the metal coating specified, or if applied by them it is done as a separate operation, it is apparent that the gauge established by the Act applies only to the uncoated or black sheets and plates. Any other interpretation of the Act would nullify the purpose sought to be accomplished by it, namely, the establishment of a uniform standard gauge for the guidance, protection and convenience of manufacturers and purchasers of sheet and plate iron or steel.

I have the honor to advise you, therefore, that:

(1) In the preparation of specifications for the purchase by Government Departments and independent bureaus, of sheet and plate iron or steel, whether black or galvanized,

or otherwise coated, it is not mandatory that the specifications therefor shall conform to the standard gauge prescribed by the Act of March 3, 1893; and

(2) There is nothing in said Act, or in any other Act of Congress which precludes the Federal Specifications Board, in the preparation of specifications for the purchase of iron or steel sheets or plates, from specifying that all base iron or steel sheets or plates shall comply with the standard gauge established by said Act, regardless of the protective coating of other metal, or the thickness or weight thereof, which may be specified.

Respectfully,

WILLIAM D. MITCHELL.

To the PRESIDENT.

AUTHORITY OF SECRETARY OF THE INTERIOR TO CONDITION EXTENSION OF OIL OR GAS PROSPECTING PERMIT

Oil and gas prospecting permits issued under the Mineral Lands Leasing Act of February 25, 1920 (41 Stat. 437), may be extended by the Secretary of the Interior for a period within the statutory limit, and the Secretary and permittee may agree, or the Secretary may grant an extension conditioned, that drilling operations shall be postponed or suspended, leaving, however, remaining within the extension period adequate time to complete a well to the maximum depth required by said Act, by the exercise of reasonable diligence.

DEPARTMENT OF JUSTICE,

May 6, 1929.

SIR: I have the honor to acknowledge receipt of your letter of April 27, 1929, in which you ask my opinion upon the following question:

“Is the Secretary of the Interior authorized to grant an extension of an oil prospecting permit in such terms that its period must expire within the maximum limit of the statutory period, and the duration of actual operations be for a lesser period within such extension, the dates of beginning of actual operations to be stated in the extension?”

Because of both physical and economic waste of oil and gas, resulting from excess production upon the public domain, a critical situation has arisen—especially in the Kettleman Hills field in California—which requires careful study and, in the meantime, a suspension of drilling operations

wherever practicable, until a solution of the problem may be found. You add:

"If I may validly condition an extension (whose period shall be within the maximum allowed by law) on confinement of drilling operations to a latter part of that period, I desire to do so."

There are now before you a number of applications for extensions of permits which directly involve the question upon which my opinion is desired.

The Act of February 25, 1920 (41 Stat. 437), entitled, "An Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," subjects all public lands, with a few exceptions set out in section 1, "to disposition in the form and manner provided by this Act to citizens of the United States," etc. Section 13 is in part as follows:

"That the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land * * * upon condition that the permittee shall begin drilling operations within six months from the date of the permit, and shall, within one year from and after the date of permit, drill one or more wells for oil or gas to a depth of not less than five hundred feet each, unless valuable deposits of oil or gas shall be sooner discovered, and shall, within two years from date of the permit, drill for oil or gas to an aggregate depth of not less than two thousand feet unless valuable deposits of oil or gas shall be sooner discovered."

Section 14 provides, in substance, that the permittee shall be entitled, as a reward for his discovery of valuable oil or gas deposits, (a) to a 20-year lease of one-fourth of the land (at least 160 acres) included in the permit on a royalty of 5 per cent, and (b) to a preference right to a lease of the remainder of the land.

Section 32 authorizes the Secretary of the Interior "to prescribe necessary and proper rules and regulations and to

do any and all things necessary to carry out and accomplish the purposes of this Act * * *."

Section 37 enacts "that the deposits of * * * oil, oil shale, and gas, herein referred to * * * shall be subject to disposition only in the form and manner provided in this Act."

The Acts of January 11, 1922, 42 Stat. 356, April 5, 1926, 44 Stat. 236, and March 9, 1928, 45 Stat. 252, in substantially similar terms provide that permits issued under the Mineral Leasing Act (the Act of February 25, 1920) may be extended by the Secretary of the Interior, under the first of said Extension Acts, for three years, and under the last two for two years, if he finds that the permittee has exercised reasonable diligence to comply with the conditions of his permit. The Act of March 9, 1928, (45 Stat. 252) is as follows:

"CHAP. 163.—An Act To grant extensions of time of oil and gas permits.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any oil or gas prospecting permit issued under the Act entitled 'An Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain,' approved February 25, 1920, or extended under the Act entitled 'An Act to authorize the Secretary of the Interior to grant extensions of time under oil and gas permits, and for other purposes,' approved January 11, 1922, or as further extended under the Act of April 5, 1926, may be extended by the Secretary of the Interior for an additional period of two years, if he shall find that the permittee has been unable, with the exercise of reasonable diligence, to begin drilling operations or to drill wells of the depth and within the time required by existing law, or has drilled wells of the depth and within the time required by existing law, and has failed to discover oil or gas, and desires to prosecute further exploration.

"SEC. 2. Upon application to the Secretary of the Interior, and subject to valid intervening rights and to the provisions of section 1 of this Act, any permit which has already expired because of lack of authority under existing law to

make further extensions, may be extended for a period of two years from the date of the passage of this Act."

The manifest object of the extension of a prospecting permit is to enable the permittee to continue the work of exploration and complete a producing well within the additional period granted. The Extension Acts do not, like the initial Act of February 25, 1920, fix specific times within the maximum period, for the beginning, prosecution, and completion of a test well. In the nature of things, that would be impracticable, as the actual drilling situation on the various tracts (some 34,000 permits have been granted) will vary greatly. At the dates of expiration of the permits, the exploration work will be in many different stages of development, ranging all the way from the mere placing of machinery on the ground or the erection of a derrick (or not even that much) to actual wells in all stages of progress from "spudding in" to within a few feet of completion. But though the Extension Acts do not prescribe the rate of progress to be made by dates, like the original Act, which begins with nothing done, they do, like the original Act, look forward to the completion of a well or wells and to the ripening of the prospecting permits into a formal lease under the original Act.

I am informed that it has been the general practice of the Secretary of the Interior to grant extensions of permits without requiring any specific work to be done by the permittee. The form of extension used merely recites: "It is expected that substantial progress will be made toward development." The permittee was left to work out his own program of development, having regard to the progress already made and the particular conditions confronting him. The permittee had the right to postpone the completion of a well to any convenient time within the period of extension granted by the Secretary.

Since the Extension Acts do not require the permittee to do specific acts within specific times and the administrative practice has recognized that the permittee has a discretion not incompatible with diligence, as to the apportionment of drilling work within the limit of the extension period, I am of the opinion that the Secretary and the permittee may agree, or the Secretary may grant an extension conditioned

that drilling operations shall be postponed or suspended, dependent on the circumstances of each case, leaving, however, remaining within the extension period, adequate time to complete a well to the maximum depth required by the Act of February 25, 1920, by the exercise of reasonable diligence. This plan seems not inconsistent with the interpretation and administrative practice of the Department (which are entitled to respect, *Logan v. Davis*, 233 U. S. 613, 627); it accomplishes the object of the Mineral Leasing Act both as regards the prevention of waste (Section 16) and the completion of a test well within the statutory time (Section 13); and it secures to the permittee all of the substantial benefits of the Extension Act. I see no legal objection to it.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE INTERIOR.

VALIDITY OF CONTRACT AWARDED BY GOVERNMENT TO
PAN AMERICAN-GRACE AIRWAYS, INC.

A contract was awarded by the Postmaster General to the Pan American-Grace Airways, Inc., for the transportation of mail from the Canal Zone to points in South America and return, which contract was authorized by the Act of March 2, 1929 (45 Stat. 1449) and was awarded after that Act became effective, but the bids for this specific service were invited and received prior to the passage of said Act authorizing the contract.

Held, under the circumstances of this case, that the course followed in securing bids was in substantial compliance with the requirements of law and within the limits of discretion vested in the Postmaster General, and that the contract is valid.

DEPARTMENT OF JUSTICE,

May 6, 1929.

SIR: In your letter of April 1, 1929, you called my attention to a contract awarded by your predecessor to the Pan American-Grace Airways, Inc., dated March 2, 1929, but executed and delivered on March 4, 1929, and asked whether, under the facts disclosed in the large record which you sent, the award was lawfully made; and, if not, whether you may rescind the contract without rendering the Government

liable in damages for breach of contract. Accompanying your letter was an opinion by the Solicitor of your Department, in which he answered the first question in the affirmative and the second question in the negative.

On January 31, 1929, the Post Office Department advertised for proposals for the transportation of mail by aircraft on Route No. 9, from the Canal Zone to points in South America and return, the bids to be filed by noon on February 28, 1929. Five bids were received. On March 2, 1929, Postmaster General New awarded the contract to the Pan American-Grace Airways, Inc., and on March 4, 1929, a formal contract for the service was signed by him and by the company. An unsuccessful bidder protested against the award and urged several grounds for its rescission. The only ground which, in my opinion, is worthy of any serious consideration is that the contract was void because, at the time the bids were invited and received, there was no statute which authorized the Postmaster General to make the contract contemplated by the advertisement.

The Act of March 8, 1928, c. 149, 45 Stat. 248, U. S. C. Title 39, sec. 465 (a), provided as follows:

"That when, in his judgment, the public interest will be promoted thereby, the Postmaster General is authorized to enter into contracts for the transportation of mails by air to foreign countries and insular possessions of the United States for periods of not more than ten years, and to pay for such service at fixed rates per pound or per mile; and the Postmaster General is hereby authorized to award such contracts to the bidders that he shall find to be the lowest responsible bidders that can satisfactorily perform the service required to the best advantage of the Government: *Provided*, That the rate to be paid for such service shall not in any case exceed \$2 per mile: *And provided further*, That in the award and interpretation of the contracts herein authorized, the decision of the Postmaster General shall be final, and not subject to review by any officer or tribunal of the United States, except by the President and the Federal courts.

SEC. 2. The Postmaster General shall make and issue such rules and regulations as may be necessary to carry out the provisions of this Act."

On January 10, 1929, a bill was introduced in the House of Representatives which, after some amendments, was passed and became the Act of March 2, 1929, affecting in some respects the contract now under consideration. This Act amended the Act of March 8, 1928. The earlier Act authorized contracts for transportation of mails to foreign countries with no express provision covering mails from foreign countries to the United States. Any doubt as to the power of the Postmaster General to contract for transportation of mails both ways was removed by the Act of March 2, 1929.

The earlier Act dealt with transportation of mail to foreign countries and insular possessions, and the later Act contained a provision definitely including the Canal Zone.

The most important amendment to the law affecting the present case related to the compensation to be paid. The earlier Act required fixed rates per pound or per mile; whether a combination basis was permissible was doubtful, and in any event there was an express provision that the compensation should not exceed \$2.00 per mile. The later Act made it clear that a combination rate, including weight and distance, could be used and it modified the limit of \$2.00 per mile by allowing additional compensation per pound per thousand miles for mails in excess of the specified load.

The advertisement for bids in the present case specified a price basis, which allowed bids at rates in excess of the limit fixed by the earlier Act but authorized by the Act of March 2, 1929, and the bid actually submitted by the successful bidder fixed a basis for compensation which might on any trip exceed the limit fixed by the earlier Act. In these respects the published advertisement for bids proceeded on the theory that the authority to make a contract on the basis of the advertisement would be granted by Congress before the contract was awarded.

The contract under consideration was authorized by the Act of March 2, 1929, and was not awarded until after that Act had become law. The advertisement followed the introduction of the bill in Congress, and the reason for advertising for bids at that time was to save time so that the Postmaster General would be in a position to consider and act upon the bids as soon as statutory right to do so was con-

ferred. In his judgment unnecessary delay would thereby be avoided. The advertisement was such as would have been proper under the Act of March 2, 1929, had advertisement been delayed until after the passage of that Act. The Act itself does not provide any specific method of obtaining bids. The sole direction in that respect being that—

“the Postmaster General is hereby authorized to award such contracts to the bidders that he shall find to be the lowest responsible bidders that can satisfactorily perform the service required to the best advantage of the Government.”

This language clearly contemplates competitive bidding, and it is equally clear that it leaves to the Postmaster General a very wide measure of discretion as to the means and methods of securing the bids. There was at the time the bids were invited no statute of general application which prescribed any particular method to be followed in inviting bids for postal service, except section 3951 of the Revised Statutes, relating to “general mail lettings” in the various States and Territories of the United States, which clearly did not apply to the present case. There were, however, several statutes relating to particular kinds of mail service, as, for instance, the Act of April 21, 1902, c. 563, 32 Stat. 114, as amended by the Act of March 2, 1907, c. 2513, 34 Stat. 1211, and by the Act of May 27, 1908, c. 206, 35 Stat. 412, authorizing contracts for pneumatic tube service after advertising once a week for a period of six weeks in not less than five newspapers; also the Merchant Marine Act of May 22, 1928, c. 675, 45 Stat. 694, sec. 406, requiring advertising once a week for three weeks. The Act of March 1, 1921, c. 88, 41 Stat. 1152, and the Act of February 2, 1925, c. 128, 43 Stat. 805, as amended by the Act of June 3, 1926, c. 460, 44 Stat. 692, authorized the Postmaster General to contract for the transportation of mail by aircraft without mentioning advertising, and the Act of March 8, 1928, c. 149, 45 Stat. 248, as amended by the Act of March 2, 1929 (H. R. 16131, Public No. 904), contained no specific direction as to advertising.

There was also in effect section 3709 of the Revised Statutes, which provides generally that all purchases and contracts for supplies in any of the Departments of the Government, except for personal services and in case of public

exigency, shall be made by advertising a sufficient time previously for proposals respecting the same. The lack of uniformity in the statutes, and of specific provisions in the statute we are considering, together with the other language of the Act, makes clear the purpose of Congress to leave the method of advertising for bids as a detail within the discretion of the Postmaster General. In my opinion the procedure followed was, as to method and length of time, well within that discretion. It was in accordance with methods and practice which had been generally followed by the Post Office Department.

The real question in the case is whether the contract is void because the advertisement for bids and the reception of the bids took place before the passage of the statute authorizing the making of the contract. The purpose of Congress in requiring that contracts shall be let after public advertisement is to procure open competition. Any course of action which has the effect of defeating that purpose would be contrary to law. The argument now made against the validity of this contract is that persons who might otherwise have entered the competition and submitted bids may have been deterred from so doing by uncertainty as to whether the bill, which would enable the Postmaster General to make a contract in accordance with the advertisement, would be passed. In my opinion, it cannot be said, as matter of law, that advertising for bids before the enactment of a statute authorizing the contract necessarily renders void the contract let after the required statutory authority is obtained. Whether the purpose of the statute requiring real competitive bidding is defeated by such procedure depends upon the facts and circumstances of the particular case. A case may well be imagined where uncertainty in ultimately obtaining statutory authority for the contract is great, and the expense to bidders of making bids or putting themselves in a position to perform the contract would be so great, that the possibility that the contract might never be awarded through lack of statutory authority would seriously restrict the competition. There are no circumstances in this case which justify the conclusion that responsible concerns equipped to perform the contract were deterred from entering the competition by any

uncertainty as to whether statutory authority would be obtained. The bill ultimately enacted into law was introduced for the very purpose of providing the authority for this contract.

Several of the amendments affecting this case were for the purpose of clarifying and removing obvious defects in the original statute. It does not appear that the substantial changes which were made in the law related to controversial matters. There seems to have been every reasonable probability that the enabling legislation would pass promptly and there is no suggestion from any source that uncertainty as to the enactment of the enabling legislation, or the fact that the advertisement was published and bids received in advance thereof had the effect of restricting the competition or preventing bids which might otherwise have been submitted. The question is largely one of first impression. There is very little in the way of precedent to rely on.

The question comes down to the practical one whether on the 2nd of March, 1929, when the Act became effective, the Postmaster General was in possession of bids from "bidders," one of whom he had a right to regard as the lowest responsible bidder that could in his opinion satisfactorily perform the service required to the best advantage of the Government. There is no question that bids had been received; there is no question that reasonable notice had been given, and reasonable opportunity afforded for those who wished to bid to do so. There is no doubt that the bids related to the specific service which was required, and, so far as I can see, there is no reason to believe that the purpose of the law in providing for the award of a contract upon competitive bidding had not been accomplished; or, that in accepting the bid, the Postmaster General did not protect the interest of the United States according to his best judgment in the exercise of the very broad discretion entrusted to him by Congress. The conclusion that, as matter of law, the bids thus obtained must be rejected and the whole thing done over again, merely because, at the time the bids were received, there was no specific provision of law authorizing the making of the contract contemplated, is not required or justified by any statute or by any fundamental principle of law. Neither my own research, nor that of counsel for the

successful and unsuccessful bidders, has found any judicial authority which I deem controlling, or indeed very helpful. I think the question calls for the application of sound sense and good judgment upon a practical business proposition. To say that other persons or corporations competent to perform the service, and willing to bid therefor, would or might have been prevented from bidding because the Act of March 2, 1929, had not then become law appears to me to be mere speculation, without basis of probability. A doubt based upon such considerations seems fanciful rather than substantial.

There is a decision by Comptroller General McCarl (2 Dec. Compt. Gen., 739), which is based upon principles which we are justified in applying here. From his decision it appears that the city commissioners of Pawhuska, Oklahoma, had received bids for paving and otherwise improving certain streets, some of which abutted lands owned by Indians which were under the supervision of the United States Government and against which the city was powerless to assess the cost of the improvements. With the advertisement notice was given that the city would not contract for that part of the work, but that bids would be received for the entire work. The Government was represented in the preparation of the specifications and at the opening of the bids. The manner and form of securing competition were in all respects substantially similar to the procedure as it would have been had the advertising been by the Government pursuant to the provisions of section 3709, R. S., and the prices quoted in the lowest and accepted bid were reasonable and satisfactory. Later, Congress made an appropriation for the cost of the work adjoining the Indian lands. The question presented was whether the Government could avail itself of the bids already received and join in the contract already made, or whether there would have to be readvertisement for those parts of the streets paved by the United States. In holding that readvertisement was not necessary, the Comptroller General said:

“Whether section 3709, Revised Statutes, requires that the competitive bids be secured by the Government need not be determined. The manner in which bids shall be procured, is not fixed and if the facts show the bids were, in fact, pro-

cured for the use of the United States, it may be accepted as a compliance with said section 3709, Revised Statutes, other facts appearing showing the necessity for proceeding in the manner indicated."

In the case of *State v. King*, 109 La. 799, the court took a different view of a somewhat similar situation. In that case the City of New Orleans advertised for bids on a contract for the construction of an electric light plant. One of the specifications contained in the advertisement was that the work would be paid for from anticipated revenues. There was at the time, and had been for years, a statute prohibiting the municipalities of the State from anticipating their revenues. Though a subsequent statute authorizing the proposed contract was passed, the court nevertheless held that the original advertising was not a compliance with the city charter. In reaching that decision the court held that the advertisement was void upon its face, for it purported to obligate the municipality in a manner prohibited by law. There were several considerations which undoubtedly influenced the court which are not present in the case I am considering, and I do not regard the case as sufficiently strong to cause me to doubt the correctness of the conclusion which I have already indicated.

In my opinion, under the circumstances of this case, the course which was followed was in substantial compliance with the requirements of law, and within the limits of discretion vested in the Postmaster General, and the contract is valid.

Respectfully,

WILLIAM D. MITCHELL.

To the POSTMASTER GENERAL.

AUTHORITY OF SECRETARY OF THE TREASURY TO COMPROMISE FINAL JUDGMENTS

The Secretary of the Treasury has no authority under section 3469 of the Revised Statutes to accept the offer of the Great American Indemnity Company in compromise of certain final judgments recovered by the United States against the surety company upon forfeited bail recognizances, there being no doubt as to the entire collectibility of these judgments.

DEPARTMENT OF JUSTICE,
May 8, 1929.

SIRS: Your letter of March 16, 1929, submits for my opinion the question whether you have authority under section 3469 of the Revised Statutes to compromise certain judgments recovered by the United States upon forfeited bail recognizances. The circumstances giving rise to your inquiry appear to be as follows:

On September 14, 1927, each of five defendants held upon a charge of having conspired to violate the National Prohibition Act and the Tariff Act of 1922 entered into a bond, in the sum of \$5,000, with the Great American Indemnity Company as surety, conditioned upon the appearance of the principal at the November Term, 1927, of the United States District Court at Norfolk, Virginia. The criminal case was set for trial on December 5, 1927, and on December 20, 1927, none of the defendants having appeared, the court declared each of the bonds forfeited. *Scire facias* proceedings thereafter brought resulted in the recovery by the United States of a separate judgment upon each bond. On June 1, 1928, one day after the entry of these judgments, four of the defendants surrendered, and they were subsequently tried, convicted and sentenced. The fifth defendant, Joseph Dally, has neither surrendered nor been apprehended, and the judgment upon the bond given by him, together with interest and costs, has been paid by the surety company.

Petitions by that company, under section 1020 of the Revised Statutes, for remission of the amounts of the remaining four judgments having been denied by the court, the company, by letter dated December 17, 1928, submitted to you an offer of \$1,000 in compromise of these unsatisfied judgments, which total \$20,000. As reasons why the offer should be accepted, the letter referred to the fact that the company had already paid in excess of \$5,000 in satisfaction of the judgment upon the bond given by the defendant Dally, and stated that, owing to its lack of experience in such matters, the company had not entered into any separate indemnity agreements with the principals at the time it became surety upon these bonds, and that any loss resulting therefrom would, therefore, fall entirely upon it; that it

had expended considerable sums of money in endeavoring to apprehend the said defendants, whose surrender was due largely to its efforts, and that by virtue of such surrender on the day following the entry of the *scire facias* judgments and of the trial and convictions which followed, the United States had lost none of its rights, the ends of justice were properly served, and the United States should not demand the full amount of the penalty for the default, but should accept the offered compromise, which would reimburse it for its expenses incurred in seeking the apprehension of these defendants.

Pursuant to the practice in such cases, the compromise offer was referred to the United States Attorney for his recommendation in the premises. Estimating that the Government had expended between \$1,500 and \$2,000 by reason of the failure of the said defendants to appear as required by their bonds, that officer recommended that if the surety company should submit an offer of \$2,000 in settlement of these judgments, the offer should be accepted, if cognizable under section 3469 of the Revised Statutes.

The surety company thereupon submitted a new offer in the sum of \$2,000, and the Solicitor of the Treasury recommended that it be accepted. In making such recommendation, the Solicitor referred to conflicting opinions of the Attorney General upon the question of the authority of the Secretary of the Treasury, under section 3469, to compromise final judgments recovered by the United States the full amounts of which could be collected, and based his conclusion that such authority existed upon an opinion by Attorney General Wickersham (29 Op. 217), wherein the previous opinions of the Attorney General upon the subject were reviewed and the opinion expressed that, in passing upon offers to compromise final judgments, the Secretary of the Treasury was not restricted to a determination of whether the judgments could be collected, but was authorized to determine, upon considerations of justice, equity, and sound public policy, whether their collection in full should be insisted upon by the Government.

In view of the matters stated and because of a doubt engendered by the divergent views expressed by my predecessors, you ask to be advised whether you have authority

under section 3469 to accept the offer of the Great American Indemnity Company in compromise of the aforesaid judgments, as to which you say no appeal has been taken and no showing or claim made that they cannot be collected in full.

Section 3469 of the Revised Statutes, which has been carried without change into the United States Code as section 194 of Title 31, reads as follows:

“Upon a report by a district attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim, and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered, and upon the recommendation of the Solicitor of the Treasury, the Secretary of the Treasury is authorized to compromise such claim accordingly. But the provisions of this section shall not apply to any claim arising under the postal laws.”

Except for the final provision regarding claims arising under the postal laws, section 3469 reenacted, word for word, the provisions of section 10 of the Act of March 3, 1863 (c. 76, 12 Stat. 737). Construing the latter statute in 12 Op. 543, Attorney General Evarts, in response to an inquiry by the Postmaster General whether it authorized a compromise by the Secretary of the Treasury of a claim against a surety upon a forfeited recognizance given for the appearance in court of a person charged with robbing the mail, said:

“The statute was not intended to vest in the Secretary of the Treasury any authority, or impose upon him any duty touching the administration of the criminal laws of the United States. Its purpose simply was to enable the Government to realize the largest amounts from money claims which might be of doubtful recovery or enforcement, and to accomplish this object the Secretary of the Treasury was empowered to compromise such claims upon the recommendation of the counsel having charge of them and of the Solicitor of the Treasury. This power is strictly, therefore, a fiscal one, and is to be exercised in each case upon fiscal considerations alone.

"* * * But if it was made to appear to the Secretary of the Treasury that the United States could not realize by judgment and execution the full amount of the debt, by reason of the insolvency of the surety or other impediment, the Secretary was authorized, upon the concurring recommendations of the district attorney and the Solicitor of the Treasury to effect a compromise of the claim upon the best terms that could be obtained."

Similar views were expressed by Attorney General Devens in 16 Op. 259. The question there propounded by the Secretary of the Treasury was whether an offer of compromise could be accepted under section 3469 where the proponent is able to pay the full amount claimed by the United States, but the United States Attorney recommends acceptance of the compromise offer because he doubts his ability to obtain a judgment. In reply, Mr. Devens said (p. 260):

"Section 3469 is a general section, relating to all claims in favor of the United States not elsewhere specifically provided for. The former letter from this Department expressed the opinion that under that section, where the defendant was entirely solvent, it was not the duty of the Solicitor of the Treasury to recommend a compromise upon the ground that circumstances of hardship existed affecting the defendant. It assumed that the United States was able fully to prove its claim, and merely determined that compromise ought not to be recommended because it was hard to enforce the claim.

"The present inquiry, however, presents the additional fact that it is uncertain whether or not the Government can prove its case. There is therefore this distinct element in the case upon which a compromise can properly be made, resulting from the uncertainty in which the Government is placed as to its ability to obtain a verdict; and in such case it seems to me that a compromise may properly be recommended, not upon the ground that the case is a hard one as against the defendant, but upon the same ground upon which contested claims are often compromised by parties, in view of the uncertainty as to their obtaining a judgment."

In 16 Op. 617, Solicitor General Phillips, in an opinion approved by Attorney General Devens, advised the Solicitor of the Treasury that section 3469 conferred no author-

ity upon that officer to recommend for compromise by the Secretary of the Treasury cases in which the claim is entirely solvent, but where circumstances of hardship, etc., exist. The opinion was based, not only upon a construction of the language of section 3469, but upon an analysis of the provisions of the Act of 1863 from which that section was derived. It was therein said:

"The purport of the section is that, as to certain claims in favor of the United States in the hands of district and other attorneys for collection, such attorneys may make reports showing the *condition* thereof, 'and the terms upon which the same may be compromised,' and recommending the acceptance of such terms, whereupon, if the same be also recommended by the Solicitor of the Treasury, the Secretary of the Treasury is authorized to compromise accordingly.

"It seems to me that the phrases *condition of the claim* and *may be compromised* both indicate the circumstances which alone authorize the recommendation. The first denotes *doubtful* claims, and the second directs the attorney to report the *most that can be had* by compromise.

"The title and structure of the act of 1863, from which this section was copied, is to the like effect. That title is, 'An act to prevent and punish frauds upon the revenue, to provide for the more certain and speedy collection of claims in favor of the United States, and for other purposes' (12 Stat., 737). The act consists of fourteen sections, the first eight of which plainly concern frauds upon the customs; the ninth directs the Solicitor of the Treasury to dispose of unproductive property acquired by the United States under judicial proceedings or otherwise; the tenth is that in question; the eleventh gives to district attorneys a commission of 2 per cent. upon all moneys collected under the revenue laws; the twelfth and thirteenth provide for the defense of collectors, &c., by district attorneys; and the fourteenth is a repealing section. The first eight, then, come under the first clause of the title, the next three under the second, and the last three under the third. The ninth is a means for turning the fruits of former judgments and executions into *money*; the tenth for the better ascertainment and realization of the *value* of claims in the course of

collection; while the eleventh is intended to increase the diligence of the district attorneys, upon whom, mainly, devolves the duty of carrying out the policy of the section immediately before. The amount of their compensation is made to depend upon the amount of what they secure by the compromise which they recommend.

"The relation between the body of this act and its title is the more relied upon because it appears from the *Globe* that its main outlines and its title, as introduced, were preserved during its passage through Congress.

"These are some of the reasons which have led me to conclude that the section in question confers no authority in regard to cases merely *hard*.

"If the language and general purview of the act were more doubtful than they seem, it would have to be borne in mind that the *grace* of the Government, as regards its debtors, is vested in Congress; that *hard cases* are proverbially *quicksands*; and, therefore, it would require clear and specific words to show that the legislature had devolved upon another department so broad and indefinite a prerogative over the public purse."

In 17 Op. 213, Attorney General MacVeagh expressed views which to some extent conflicted with the prior opinions of the Attorney General above noted. Replying to a request by the Secretary of the Treasury for an opinion as to the correctness of a memorandum prepared by Assistant Secretary French upon the extent of the Secretary's authority to compromise cases, Mr. MacVeagh said (p. 214):

"I beg now to state that I have very carefully considered the subject, and I regret to say that I do not find myself able to agree entirely with the former opinions of this Department referred to in the memorandum of Judge French. Those opinions appear to hold that the only consideration that the Secretary of the Treasury is at liberty to take into account in deciding upon the advisability of any proposed compromise, either of a claim not in suit, or of a suit pending, is whether the Government can realize more money by its prosecution than by accepting the settlement proposed."

Declaring that he was unable to discover a sufficient basis for such construction in section 3469 of the Revised Statutes, Mr. MacVeagh referred to the requirement of that section, that the district attorney, or other officer having charge of the claim, shall report in detail "the condition of such claim" and "the terms upon which the same may be compromised," and remarked that he did not see that any special import was to be attached to the expressions quoted, and that he thought they left the question of the Secretary's authority open to general considerations. Following further statements to the effect that the grant of authority was general and comprehensive in its language; that the requirement of the concurrence of the several officers mentioned in the statute placed ample safeguards around the exercise of the authority conferred, and that if Congress had desired to impose any limit upon the considerations which the Secretary might entertain in reaching his conclusion, it could easily have done so, Mr. MacVeagh observed (p. 215-216):

"I am also unable to imply from the provisions of the law under review any intention on the part of Congress that the Secretary of the Treasury should be compelled to pursue litigations out of which the United States might undoubtedly realize smaller or greater sums of money, but which in his judgment ought not to be further prosecuted. As an illustration, if a person has been guilty of a technical violation of the internal revenue laws, and upon being informed of it, offers to compromise the case by the payment of the costs and of any other sum justly due the Government, I see no evidence in these sections of the Revised Statutes, or in the laws from which they were draughted, that Congress intended to require that a suit shall be commenced and prosecuted to extort the penalty intended only for willful violators of the law, and the same considerations would apply to a great variety of cases, some of which must be of frequent occurrence in the administration of the Treasury Department, where the rigid enforcement of the technical legal rights of the Government would work manifest and plain injustice by taking from citizens money which, in the forum of conscience and good morals, they did not owe to

it. It is not necessary to hold that the Secretary of the Treasury is in the matter of compromise a fountain of the compassion of the Government or an almoner of its charity. Those are considerations which do not belong to the administration of a business department. But, on the other hand, it is to my mind as clearly unnecessary to hold that the Secretary is bound to be an instrument of manifest injustice, and to ask himself only in every case this question, Will the prosecution of the claim in question probably bring to the Treasury more money than its compromise upon the terms proposed?

"I have, therefore, to advise you that while, in considering any compromise submitted to your judgment, you are not at liberty to act from motives merely of compassion or charity, you are at liberty, until Congress sees fit to limit your authority, to consider not only the pecuniary interests of the Treasury, but also general considerations of justice and equity and of public policy."

It will be noted that the foregoing opinion differed from the opinions of the Attorney General theretofore rendered in that it held that the Secretary of the Treasury was not confined, in the matter of compromising claims in favor of the United States, to the purely fiscal consideration of whether such claims could be collected, but was authorized to take into account considerations of justice, equity and public policy. The only compromises therein referred to, however, were those arising for consideration prior to, or pending, suit. As reasons might readily be conceived which would render doubtful the collectibility of a claim prior to suit, or the obtaining of a judgment thereon pending suit, Attorney General MacVeagh's opinion is manifestly not a precedent upon the question here under discussion, viz, whether the statute confers authority to compromise a *final judgment where there is no doubt of its collectibility*.

In 21 Op. 50, the question was whether, upon the recommendation of the United States Attorney and the Solicitor of the Treasury, the Secretary of the Treasury was authorized by section 3469 to accept an offer by the International Cotton Press Company of \$50 in consideration of the release of a lien held by the United States upon real estate owned by that company. It appeared that the real estate

in question was purchased by the company from one Snyder after certain internal revenue taxes adjudged by the Supreme Court to be owing by Snyder had accrued. In an opinion approved by Attorney General Olney, Solicitor General Maxwell concluded that section 3469 conferred no such authority, saying (p. 51):

"The petition for settlement and the recommendations in support thereof are not based upon doubts as to the possibility of realizing the amount of the tax out of the property, but upon the ground of the hardship to the company supposed to be involved in enforcing against it the laws of the United States as interpreted by the Supreme Court in a proceeding to which the company was a party.

"I am of the opinion that section 3469 has no application to such a case. * * *

"The section does not authorize the Secretary of the Treasury to remit or release moneys due to the United States and clearly recoverable, but to 'compromise,' which implies a claim of doubtful recovery or enforcement.

"In the case which you submit there is nothing to 'compromise,' for the right of recovery and the amount have been finally adjudged by the court of last resort, and the property is said to be sufficient to satisfy the debt."

In 21 Op. 264, the foregoing opinion was reconsidered and the same conclusion reached by Attorney General Harmon, who said (p. 265):

"The petitioner seeks to be relieved from this adjudged lien on its property on the ground of hardship, because, being protected by no recording act, it bought in ignorance of the Government's claim. This is a hardship shared with all persons who, without sufficient inquiry, buy property subject to claims which the law does not require to be recorded, such as dower rights in estates. The petitioner also claims that the full amount could have been collected from Snyder if the Government had proceeded promptly against him individually instead of relying (as it had a right to do) upon its lien on his property; and that Snyder has since become insolvent, so that, if petitioner's land were sold, it could have no recourse against him.

"Upon taking up this claim for consideration you were confronted with the question, whether it is within your

power to release, in whole or in part, a judgment recovered by the United States, from which there is no appeal and of whose collectibility in full there is no doubt."

After quoting from the previous opinion of Solicitor General Maxwell, Mr. Harmon continued (p. 266):

"I am, however, clearly of the opinion that the opinion already given is correct. The construction given to the statute accorded with that of Mr. Evarts (12 Opin., 543), and with that of Mr. Devens and Mr. Phillips (16 Opin., 617). *If the opinion of Mr. MacVeagh (17 Opin., 213) is to be construed as holding that a claim may be compromised when there is no doubt of its entire and ready collectibility, I am unable to concur with it. It appears to ignore the clear distinction between the compromise of a doubtful case and the remission of a penalty, forfeiture, or disability.* (Rev. Stat., secs. 3461, 5292.) The former power, as said by Mr. Evarts in the opinion above cited, is strictly a fiscal one. The latter is in the nature of a pardoning power. (*The Laura*, 114 U. S., 411, 413-414.)" (Emphasis supplied.)

In 23 Op. 18, the Secretary of the Treasury was advised that he had no authority to accept an offer in compromise of a judgment recovered by the United States upon the official bond of a receiver of public moneys in Arizona and affirmed by the Supreme Court. In the opinion, which was prepared by Solicitor General Richards and approved by Attorney General Griggs, it was said (p. 19):

"It is conceded that this final judgment can be collected from the sureties, but a so-called compromise offer is submitted and urged on the ground that it would work a hardship to enforce the collection of the entire amount of the judgment. The grounds of hardship were presented to the courts as a defense to the suit, and are set forth in the statement and opinion of the Supreme Court (170 U. S. 372). The only question presented to me is whether a final judgment in favor of the United States, which is collectible, can be 'compromised' under section 3469 of the Revised Statutes, * * *."

Following a reference to the opinion of Solicitor General Maxwell, approved by Attorney General Olney (21 Op. 50),

and to the opinion of Attorney General Harmon, reaffirming it (21 Op. 264), the opinion stated (p. 20) :

“No reasons have been advanced or suggest themselves justifying a change of the construction placed upon this section by my predecessors. A compromise is an adjustment or settlement by mutual concessions. The claim must in some way be doubtful. There must be room for the ‘play of give and take.’ For this reason the statement from the attorney in charge ‘showing in detail the condition of such claim, and the terms upon which the same may be compromised,’ is required. In the case of a collectible judgment there is no room for ‘give and take,’ no basis for a compromise; the concession is all on the one side, the side of the Government, which remits in place of compromising.”

In 23 Op. 631, Attorney General Knox approved an opinion prepared by Solicitor General Richards containing like views regarding the effect of section 3469. The question there was whether the Secretary of the Treasury had power under that section to accept an offer to compromise a claim of the United States for interest upon unpaid tax, bonus and rental due under a contract for taking fur seals in Alaska. Advising that section 3469 conferred such authority, Solicitor General Richards said (p. 633) :

“In an opinion given January 17, 1900, I held, following Solicitor General Maxwell (21 Opin., 51), and Attorney General Harmon (21 Opin., 264, 266), that this section does not authorize the Secretary of the Treasury to compromise a claim which has been reduced to judgment, affirmed by the highest court, and is clearly collectible, because a compromise is an adjustment or settlement by mutual concession. The claim must in some way be doubtful. There must be room for the ‘play of give and take.’ In the case of a collectible judgment, which has been affirmed by the highest court, there is no room for ‘give and take,’ no basis for a compromise; the concession is all on the one side, the side of the Government, which remits in place of compromising.

“But in the case of this claim for interest, there are involved disputed questions of fact and of law, which if put in litigation might be decided the one way or the other.

The claim, therefore, is clearly one subject to compromise under this section."

In 27 Op. 241, Attorney General Wickersham held that the Secretary of the Treasury had no authority under section 3469 to compromise a suit for a penalty incurred for violation of the Alien Contract Labor Law. Many previous opinions of the Attorney General were cited as distinguishing between the purely fiscal authority conferred by section 3469 to compromise "claims" in favor of the United States, and the authority conferred by other statutes to remit or mitigate fines, penalties and forfeitures. Reaffirming the views expressed by Attorney General Evarts (12 Op. 543), that in enacting section 10 of the Act of 1863 (later incorporated in the Revised Statutes as section 3469), it was the purpose of Congress "to enable the Government to realize the largest amount from money claims which might be of doubtful recovery or enforcement," the opinion quoted the following remarks made on the floor of the Senate by Mr. Fessenden, who had introduced in that body the bill which subsequently became the Act of 1863, and who, in support of section 11 of the bill (afterwards section 10 of the Act), said (p. 244) :

"Section 11 merely authorizes the Secretary of the Treasury, upon the report of the district attorney, or any special attorney, approved by the Solicitor of the Treasury, to compromise a claim. There are three several officers to act upon it. There must be a power to compromise claims somewhere. You can not bring every one of them to Congress. That is out of the question. There are a great many claims in favor of the United States which are like claims in favor of individuals, better compromised than left to stand; because it was a remark made by one of the shrewdest merchants I ever knew in our section of the country, that if a man who failed offered him anything, he always took his first offer; because, said he, you never get so good an offer afterwards, and he will live out of what he has in his hands as long as you put off compromising. I think it is so in a great degree with claims in favor of the United States. There is no power to compromise them now, and they lie for years. Here are three officers: first, the district attorney, or the special agent, if we have one; then

his recommendation has to be approved by the Solicitor of the Treasury; and third, by the Secretary of the Treasury. I see no possible way in which it could be fixed better, if you allow a compromise at all; and this shadowy idea of danger to the Government from compromising its old debts through three successive steps strikes me as rather imaginary; but, so far as these special agencies are concerned, I explained this morning what is the object of them."

And as an additional reason why the penalty in question could not be compromised under section 3469, Mr. Wickersham stated (p. 251):

"It may be said, in this connection, that the papers accompanying your communication show that the arguments made in support of the offer of compromise are based upon the ignorance of the offending party as to the criminality of his act in prepaying the transportation of the alien laborers referred to, and not upon any real inability to pay the full amount of the penalty incurred, although the offender claims to be a poor man and that the infliction of the extreme penalty would be a great hardship and injustice to him.

"These are manifestly considerations to be addressed to the department of the Government charged with the administration of the criminal laws of the nation, and not to the department charged only, so far as section 3469, Revised Statutes, is concerned, with the collection of revenue, and whose duty, under that section, is to be exercised upon fiscal considerations alone."

In 29 Op. 217, Attorney General Wickersham approved an opinion by Solicitor General Lehman wherein section 3469 was construed as having the effect given it by Attorney General MacVeagh in 17 Op. 213, *supra*. The questions there considered were (1) whether corporations having an annual net income of \$5,000 or less were required by the Revenue Act of August 5, 1909, to file a tax return, and (2) whether the Commissioner of Internal Revenue had authority to accept an offer in compromise of the 50 per cent addition to the tax which the Act directed the Commissioner to assess in the event of a failure to file a return required by the Act. Answering the first question in the affirmative, Solicitor General Lehman concluded that the

Act required a tax return regardless of the amount of net income received by the corporation. As to the right to compromise the 50 per cent additional assessment, he held that authority to effect such a compromise was conferred upon the Secretary of the Treasury by section 3469 of the Revised Statutes. The latter conclusion was supported by little, if any, independent reasoning, but was based almost wholly upon the views of Attorney General MacVeagh heretofore quoted and upon the following language of the Supreme Court in *Dorsheimer v. United States*, 7 Wall. 166, 174-175:

"The power intrusted by law to the secretary was not a judicial one, but one of *mercy*, to mitigate the severity of the law. It admitted of no appeal to the Court of Claims, or to any other court. It was the exercise of his discretion in a matter intrusted to him alone, and from which there could be no appeal."

As appears above, however, Mr. MacVeagh's opinion, if construed as holding that section 3469 authorized the compromise of a claim where there was no doubt of its entire and ready collectibility, was expressly overruled by Attorney General Harmon in 21 Op. 264, on the ground that it ignored the clear distinction between the compromise of a doubtful case and the remission of a penalty, forfeiture or disability; and an examination of the *Dorsheimer case* shows that the above quoted remarks of the Supreme Court were addressed to a statute which conferred upon the Secretary of the Treasury authority to *mitigate* or *remit* a fine, penalty or forfeiture, rather than to *compromise* a claim in favor of the United States.

The foregoing review of the opinions of my predecessors foreshadows the reply I must make to the question you propound. As repeatedly stated in those opinions, the word "compromise" has a clear and well defined meaning and implies the making of mutual concessions in the settlement of claims of doubtful recovery. The authority to "compromise" conferred by section 3469 can have no application, therefore, to a situation such as that here involved, where the claim has been judicially and finally determined and no doubt has been suggested of its entire collectibility. Any

uncertainty which might remain in that regard is fully dispelled by the analysis made by Solicitor General Phillips (16 Op. 617) of the Act of 1863, from which section 3469 was derived, as well as by the statement quoted by Attorney General Wickersham (27 Op. 241) from remarks on the floor of the Senate by the proponent of the bill which became the Act of 1863, regarding the purpose and scope of the original statute. The analysis and statement referred to unmistakably show that, in enacting the provisions here in question, Congress was concerned only with the interests of the United States and sought to provide a means for recovering as large a part as possible of moneys claimed by the Government which were of doubtful collectibility.

The contrary view taken in the opinion of Attorney General MacVeagh (17 Op. 213), and followed in the opinion of Solicitor General Lehman, approved by Attorney General Wickersham (29 Op. 217), manifestly disregards, not only the plain meaning of the text, but the legislative history, of the statute. It proceeds on the theory that the statute was enacted for the benefit of those against whom money claims are asserted by the United States, and was designed to relieve them of the payment of such part of the claims as the Secretary of the Treasury might determine, upon grounds of justice, equity and sound public policy, should not be exacted. While considerations of this character may doubtless be taken into account in determining whether a fine, penalty, or forfeiture shall be *remitted* or *mitigated*, as authorized, for example, by section 618 of the Tariff Act of 1922 (42 Stat. 987), or by section 709 of the Revenue Act of 1928 (45 Stat. 882), they have, in my opinion, no place in the determination of whether claims in favor of the United States shall be *compromised* under section 3469.

In answer to your inquiry, therefore, I have the honor to advise that you have no authority under section 3469 of the Revised Statutes to accept the offer of compromise made by the Great American Indemnity Company.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE TREASURY.

VALIDITY OF BOND ISSUE BY THE CITY OF MANILA, P. I.

The proposed issue by the City of Manila, P. I., of bonds for permanent public improvements in the aggregate sum of \$5,000,000, being authorized by Act No. 3456 of the Philippine Legislature of December 3, 1928, and being within the limit of indebtedness authorized for the City of Manila by Congress, and all statutory requirements regarding the issue of the bonds having been complied with, it will be proper for the Secretary of War to issue the bonds in series as the funds are required and those of the first series, amounting to \$500,000, when issued in the form proposed, will have been legally issued and will be valid and binding obligations of the City of Manila.

DEPARTMENT OF JUSTICE,

May 11, 1929.

SIR: I have the honor to acknowledge receipt of your letter of April 9, 1929, with which you transmit a copy of Act No. 3456 of the Legislature of the Philippine Islands, approved December 3, 1928, authorizing the Secretary of War to issue and sell in the name and on behalf of the City of Manila, Philippine Islands, bonds in the aggregate sum of \$5,000,000 for the purpose of providing funds to acquire and construct such permanent public improvements as may be deemed advisable and necessary. A form of the proposed bonds is enclosed with your letter, and my opinion is requested as to the legality of the bonds when issued.

While Act No. 3456 of the Legislature of the Philippines authorizes an issue of bonds in the total amount of \$5,000,000, you state that it is your purpose to issue at this time but \$500,000 of such bonds; that they are to be issued in coupon form of the denomination of \$1,000 each, bearing interest at the rate of $4\frac{1}{2}$ per cent per annum, to be dated April 1, 1929, and to mature on April 1, 1959. You further state that it is proposed to issue the balance of the bonds authorized by said Act in series of later dates as funds may be required for the purposes indicated.

Said bonds are to be issued pursuant to the authority contained in Act No. 3456 of the Philippine Legislature, approved December 3, 1928, and section 11 of the Act of Congress approved August 29, 1916 (c. 416, 39 Stat. 548), as amended by Act of May 31, 1922 (c. 203, 42 Stat. 599).

After authorizing the City of Manila to "incur a bonded indebtedness of \$5,000,000, money of the United States, for the purpose of providing funds to acquire and construct such permanent public improvements as may be deemed advisable and necessary," section 1 of Act No. 3456 provides:

"The Secretary of War is hereby authorized to issue said bonds in the name and behalf of the said City of Manila, said bonds to be payable after thirty years from the date of issue. Both the principal and the interest on the bonds shall be payable in gold coin of the United States at the Treasury of the United States. The Secretary of War shall determine the form of the bonds, the date of issue of the same, and the rate and dates of payment of the interest thereon, which rate shall not be in excess of five and one-half per centum per annum. Said bonds may be coupon bonds or registered bonds, convertible, in the discretion of the Secretary of War, into either form, and shall be in convenient denominations as may suit the purchasers thereof. In the case of the issue or transfer of any registered bond, the same shall be registered in the Treasury of the United States."

Section 2 of the Act authorizes the Secretary of War to sell said bonds upon such terms and conditions as in his judgment are most favorable to the City of Manila, and section 4 provides that said bonds shall be exempt from taxation by the Government of the Philippines, the Government of the United States, or by any State or Territory of the United States, or any municipal subdivision thereof. Section 5 provides for the creation of a sinking fund for the redemption of the bonds at maturity, and section 6 makes a permanent annual appropriation out of the general funds of the Insular Treasury of such sums as may be necessary to provide the sinking fund and for the payment of the interest on the bonds issued pursuant to said Act as the same shall become due.

Section 11 of the Act of August 29, 1916, as amended by the Act of May 31, 1922, *supra*, provides:

"* * * where necessary to anticipate taxes and revenues, bonds and other obligations may be issued by the

Philippine Government or any provincial or municipal government therein, as may be provided by law and to protect the public credit: *Provided, however,* That the entire indebtedness of the Philippine Government created by the authority conferred herein, exclusive of those obligations known as friar land bonds, shall not exceed at any one time 10 per centum of the aggregate tax valuation of its property, nor that of the city of Manila 10 per centum of the aggregate tax valuation of its property, nor that of any Province or municipality, a sum in excess of 7 per centum of the aggregate tax valuation of its property at any one time. In computing the indebtedness of the Philippine Government, bonds not to exceed \$10,000,000 in amount, issued by that Government, secured by an equivalent amount of bonds issued by the Provinces or municipalities thereof, shall not be counted."

You state that on December 31, 1928, the assessed valuation of the taxable real property in the City of Manila was \$126,215,167.50 and that its outstanding public indebtedness at the present time amounts to \$5,420,000, while there has been accumulated in the various sinking funds as of December 31, 1928, the aggregate sum of \$1,176,181.30. As the Act of August 29, 1916, as amended, *supra*, permits the City of Manila to incur an indebtedness not to exceed 10 per centum of the aggregate taxable valuation of its property, it is apparent that the proposed issue of bonds will not increase its indebtedness beyond the maximum amount allowed by law.

I find that all of the statutory requirements regarding the issue of bonds by the City of Manila have been complied with and that the form of bond submitted is in substantial compliance with the laws authorizing the issue. It is my opinion that it will be proper for you to issue the bonds in series as the funds are required and that those of the first series, amounting to \$500,000, when issued in the form proposed, will have been legally issued and will be valid and binding obligations of the City of Manila.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF WAR.

CONSOLIDATION OF BANKS LOCATED IN HAWAII

The Bank of Bishop and Company, Ltd., of Honolulu, Hawaii, is authorized by the Act of February 25, 1927 (44 Stat. 1224), to consolidate with the First National Bank of Hawaii, upon compliance with the conditions imposed by said Act.

DEPARTMENT OF JUSTICE,

May 16, 1929.

SIR: I have the honor to acknowledge receipt of your letter of May 9, 1929, stating that the Bank of Bishop and Company, Ltd., of Honolulu, Hawaii, has made application to the Comptroller of the Currency for permission to consolidate with the First National Bank of Hawaii pursuant to authority given by the Act of February 25, 1927, commonly known as the McFadden Act. You request an expression of my opinion "as to whether or not it was the intent of Congress to include banks organized under the banking laws of Territories, and specifically whether such consolidation as described above can be made under the terms of the Act of February 25, 1927."

Section 1 of the Act of February 25, 1927, c. 191, 44 Stat. 1224, entitled "An Act to further amend the national banking laws and the Federal Reserve Act," provides in part:

"That any bank incorporated under the laws of any State, or any bank incorporated in the District of Columbia, may be consolidated with a national banking association located in the same county, city, town, or village under the charter of such national banking association on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association or bank proposing to consolidate."

As the above statutory authority for the consolidation of banks incorporated under the laws of any *State* does not expressly include banks incorporated under the laws of Territories, the Bank of Bishop and Company, Ltd., being incorporated under the laws of the Territory of Hawaii, the question arises whether such banks are included by implication in the grant of authority.

The word "state," when given general application as designating the various parts of the United States, includes the District of Columbia and the several Territories of the

United States. *Geofroy v. Riggs*, 133 U. S. 258. While the word "state" is often used in contradistinction to "territory," yet in its general public sense, and as sometimes used in the statutes and the proceedings of the Government, it has the larger meaning of any separate political community, including therein the District of Columbia and the Territories of the United States. *Talbott v. Silver Bow County*, 139 U. S. 438, 441-444; *Downes v. Bidwell*, 182 U. S. 244, 260.

In *Talbott v. Silver Bow County*, *supra*, the court had under consideration the right of Territories of the United States to tax the stock of national banks under a statute granting such authority to the several States, although Territories were not expressly named therein. The court said (p. 441):

"Can it be that Congress meant to give power to the States to tax, and to withhold that power from the Territories? Some plausible reason should be suggested before the intention is imputed to Congress of granting to an independent jurisdiction, such as a State, the power to tax one of its own instrumentalities, and at the same time withholding a like power from a political organization like that of a Territory wholly dependent upon Congress, and subject to its absolute supervision and control. Such is not the ordinary lesson of experience. If the matter in respect to which such an intent was imputed were wholly of interest to the States, or designed purely for the exercise of powers within the States, then properly all general expressions in the statute might be limited to States, and the intent of Congress be supported and established by the character of the subject matter of the legislation. The converse of this is true. The national banking system was national in its design, coextensive in its operation with the territorial limits of the United States and intended to be the banking system for the whole country, Territories as well as States."

The reasoning of the Court in that case is applicable to the question under consideration. The national banking laws of the United States have been extended to the Territory of Hawaii by the Act of April 30, 1900, 31 Stat. 141. 23 Op. 177. As the Act of February 25, 1927, *supra*, authorizing banks incorporated under the laws of any State to consolidate with national banking associations, is a part of

the national banking law and as the system established by such law is "coextensive in its operation with the territorial limits of the United States," including the Territories of the United States, it follows that a bank incorporated under the laws of the Territory of Hawaii may consolidate with a national banking association located in the same city or place, upon compliance with the conditions imposed by the Act of February 25, 1927.

I have to advise you, therefore, that the Bank of Bishop and Company, Ltd., of Honolulu, Hawaii, is authorized by the Act of February 25, 1927, *supra*, to consolidate with the First National Bank of Hawaii, upon compliance with the conditions imposed by said Act.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE TREASURY.

WORLD WAR VETERANS' ACT, SECTION 213—CLAIM OF
WILLIAM BICKEL

William Bickel, while in vocational training, accompanied his counselor in an automobile controlled by the latter to the site of a new job, and, while on the premises where the work was to be performed, a branch of a tree caught in the windshield of the automobile and snapped back into Bickel's face thereby injuring his right eye, *held* that Bickel's injury resulted from his training within the meaning of section 213 of the World War Veterans' Act, 1924 (43 Stat. 623), as amended.

When Congress inserted in section 213 of the World War Veterans' Act, *supra*, the requirement that injury must result from training, without attempting to define more closely the necessary degree of casual connection, it is assumed it intended that the general word "result" should be interpreted in the light of the cases decided under the Workmen's Compensation Acts.

The opinion of June 12, 1926 (35 Op. 76), is hereby modified in so far as it intimates that cases decided under the English Workmen's Compensation Act and the Workmen's Compensation Acts of the various States can not safely be resorted to for guidance in determining whether or not an injury in any given case results from training.

DEPARTMENT OF JUSTICE,

May 17, 1929.

SIR: I have the honor to refer to your letter of April 17, 1929, requesting my opinion as to the right of William

Bickel to additional compensation under section 213 of the **World War Veterans' Act, 1924** (ch. 320, 43 Stat. 607, 623), as amended by section 11 of the Act of March 4, 1925 (ch. 553, 43 Stat. 1302, 1308), for a disability alleged to have been incurred as a result of training awarded to him under the provisions of law authorizing vocational rehabilitation for ex-service men.

You state that while in vocational training, with an objective of carpenter, William Bickel was instructed by his counselor on December 20, 1924, to accompany the counselor to the site of a new job near Sycamore Station, Md.; that they traveled in the automobile of the counselor to the site, where Bickel received instructions as to the manner in which he should proceed with the job on the next workingday; and that while the automobile was being turned around in a lane on the property preparatory to returning to Washington a branch of a tree caught in the windshield and snapped back into Bickel's face, injuring his right eye.

Section 213 of the **World War Veterans' Act, 1924**, as amended, reads as follows:

"SEC. 213. Where any beneficiary suffers or has suffered an injury or an aggravation of an existing injury as the result of training, hospitalization, or medical or surgical treatment, awarded to him under the Vocational Rehabilitation Act as amended, the War Risk Insurance Act as amended, or this Act, or as a result of having submitted to examination under authority of section 303 of the War Risk Insurance Act or section 203 of this Act, and not the result of his misconduct, and such injury or aggravation of an existing injury results in additional disability to or the death of such beneficiary, the benefits of this title shall be awarded in the same manner as though such disability, aggravation, or death was the result of military service during the World War. The benefits of this section shall be in lieu of the benefits under the Act entitled 'An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes,' approved September 7, 1916: *Provided*, That application be made for such benefits within two years after such injury or aggravation was suffered or such death occurred or after the passage of this Act whichever is the later date:

Provided further, That the provisions of section 313 of the War Risk Insurance Act as amended, relating to subrogation, shall be applicable to beneficiaries under this section."

As stated in an opinion of my predecessor dated June 12, 1926 (35 Op. 76), the benefits of section 213 are confined to cases of injuries *resulting* from training, hospitalization, or medical or surgical treatment, and hence in a case like the present there must be a causal connection between the training and the injury suffered.

It is probably impossible to state a general rule for determining whether such a causal connection is present in any given case. But while I do not question the conclusion reached in the opinion of my predecessor dated June 12, 1926, that the necessary causal connection did not exist in any of the three cases then under consideration, I believe that some of the general language used in that opinion is perhaps too broad in so far as it intimates that cases decided under the English Workmen's Compensation Act and the Workmen's Compensation Acts of the various States can not safely be resorted to for guidance in determining whether or not an injury in any given case results from training.

The English Workmen's Compensation Act and the Workmen's Compensation Acts of most of the States provide for compensation for injuries arising out of and in the course of employment. It seems to be well settled that the words "arising out of," as used in the Acts, require causal connection between employment and injury. *Fitzgerald v. Clarke and Son*, 99 L. T. R. 101; *McNicol's Case*, 215 Mass. 497; *Bryant v. Fissell*, 84 N. J. L. 72; *Hopkins v. Michigan Sugar Co.*, 184 Mich., 87; *Boyd on Workmen's Compensation*, sec. 472; *Bradbury on Workmen's Compensation*, 3rd ed., page 461. The question discussed, therefore, in many cases under the Workmen's Compensation Acts has been whether an injury arises out of or results from employment, and while these cases have not succeeded in stating a general test for determining when the necessary casual connection is present, nevertheless they have illustrated various situations which may be recognized as falling on one side or the other of the line and afford an analogy which is helpful in considering cases under the present statute. Under these circum-

stances, I think, it should be assumed that when Congress inserted in section 213 the requirement that injury must result from training, without attempting to define more closely the necessary degree of casual connection, it intended that the general word "result" should be interpreted in the light of the cases decided under the Workmen's Compensation Acts.

If I am right in that assumption, there can be no doubt that Bickel's injury resulted from his training. At the time of the injury he was in an automobile controlled by his counselor at a place which was on the premises where his work was to be performed. The counselor had control both of the automobile and of the route selected to reach the work. There are many cases under the Workmen's Compensation Acts holding that under circumstances similar to these the injury results from the employment. *De Constantin v. Public Service Commission*, 75 W. Va. 32; *In re Stacy*, 225 Mass. 174; *Sundine's Case*, 218 Mass. 1; *Sedlock v. Mining Co.*, 98 Kan. 680; *Zabriskie v. Erie R. R. Co.*, 86 N. J. L. 266; *Donovan's Case*, 217 Mass. 76; *Bradbury on Workmen's Compensation*, 3rd ed., page 480; *Boyd on Workmen's Compensation*, section 486.

Respectfully,

WILLIAM D. MITCHELL.

To the DIRECTOR, UNITED STATES VETERANS' BUREAU.

ISSUANCE OF DUPLICATE IN LIEU OF STOLEN UNITED STATES REGISTERED BOND

A United States bond registered in the name of a minor and bearing an assignment executed by the minor's natural guardian in favor of the "Secretary of the Treasury for exchange," was stolen from a bank having custody of same, held that the assignment of the bond was invalid and because of such invalid assignment a subsequent transferee of the bond can not obtain title to the same, for in contemplation of law the bond remains untransferred and retains its character as a registered bond and the protection of registration; and that, under such circumstances, the Secretary of the Treasury is authorized by section 3704 of the Revised Statutes to issue a duplicate in lieu of the stolen bond.

DEPARTMENT OF JUSTICE,

June 3, 1929.

SIR: I have the honor to acknowledge the receipt of your letter of January 19, 1929, stating that the Rushville State Bank of Rushville, N. Y. has made application under the provisions of section 3704, Revised Statutes of the United States, for the issue of a duplicate in lieu of a United States registered bond stolen from the possession of the bank.

It appears from your letter and accompanying papers that the bond was of the third series Liberty loans and registered on the books of the Treasury Department in the form "Howard Bardwell under guardianship of Fred Bardwell"; that Howard Bardwell is a minor about 18 years of age at this time, and is the son of Fred Bardwell, with whom he resides at or near Stanley, N. Y.; that Fred Bardwell is the natural guardian of Howard Bardwell, the latter having no legal guardian; that on or about January 23, 1925, the Rushville State Bank of Rushville, N. Y., forwarded the bond in question to the Federal Reserve Bank of New York with the request that it be exchanged for a coupon bond; that the bond bore an assignment by Fred Bardwell as guardian in favor of the "Secretary of the Treasury for exchange" and was accompanied by an application by Fred Bardwell on Treasury Department Form L. & C. 302, for the exchange of the bond; that the form was not completely filled out, and was returned by the Federal Reserve Bank for completion; that no attempt was made to complete the application and on February 2, 1925, at the request of the Rushville State Bank, the Federal Reserve Bank of New York returned the bond without action.

It is also stated that the Rushville State Bank retained possession of the bond, as custodian, until the night of October 21, 1925, when the bank was entered by burglars and the bond with other securities stolen; that the burglars have never been apprehended and no information has been obtained as to the disposition made of the bond; that the bank was indemnified for the loss of the bond by its insurers, the Travelers Indemnity Co. and the National Surety Co., and now desires to replace the stolen registered bond with a

coupon bond, the registered bond having matured September 15, 1928.

My opinion is requested as to whether or not the Treasury Department may issue a duplicate bond under section 3704 of the Revised Statutes which provides:

“Whenever it is proved to the Secretary of the Treasury, by clear and satisfactory evidence, that any duly registered bond of the United States, bearing interest, issued for valuable consideration in pursuance of law, has been lost or destroyed, *so that the same is not held by any person as his own property*, the Secretary shall issue a duplicate of such registered bond, of like amount, and bearing like interest, and marked in the like manner as the bond so proved to be lost or destroyed.” (*Underscoring supplied.*)

The law authorizing the third Liberty loan is contained in the Act of September 24, 1917, c. 56, section 1, 40 Stat. 288, as amended by the Act of April 4, 1918, c. 44, 40 Stat. 502. So far as material here, section 1 reads as follows:

“The bonds herein authorized shall be in such form or forms and denomination or denominations and subject to such terms and conditions of issue, conversion, redemption, maturities, payment, and rate or rates of interest, not exceeding four and one-quarter per centum per annum, and time or times of payment of interest, as the Secretary of the Treasury from time to time at or before the issue thereof may prescribe.”

In pursuance of the authority conferred upon him, the Secretary of the Treasury issued certain regulations prescribing the mode of assigning Liberty bonds and the effect of such assignments. Paragraph 5, extract No. 12, of paragraph 32, Treasury Circular No. 300, dated July 31, 1923, provides:

“Assignments of registered bonds may be made to a specified person, or in blank, or may be made to the Secretary of the Treasury for transfer to a specified person, or to the Secretary of the Treasury for exchange for coupon bonds. Registered bonds assigned in blank, or bearing assignments for exchange for coupon bonds which do not restrict delivery, are in effect payable to bearer and lack the protection of registration, since title thereto may pass by delivery with-

out further assignment. The Treasury Department therefore can grant no relief on account of the loss or theft of bonds so assigned, and will not enter caveats against their transfer, exchange, or payment even though reported lost or stolen."

Paragraph 1, extract No. 22, of paragraph 86, Treasury Circular No. 300, dated July 31, 1923, provides in part as follows:

"Registered bonds or notes assigned in blank, or bearing assignments for exchange for coupon bonds or notes without instructions restricting delivery, are in effect payable to bearer, since title thereto may pass by delivery without further assignment or indorsement. The Treasury Department can accordingly grant no relief on account of the loss or theft of bonds or notes so assigned, and will not enter caveats against their transfer, exchange, or payment, if reported lost or stolen. The Treasury Department assumes no responsibility with respect to bonds or notes so assigned, but if notified of their loss or theft will make appropriate notations on its records, and, in the event that the bonds or notes thereafter are received for transfer, exchange, or payment, may require the person presenting such bonds or notes to submit evidence showing whether or not he is a bona fide holder in due course. If it appears that the person presenting the bonds or notes is not a bona fide holder in due course, the Department may withhold transfer, exchange, and payment, and in any event it will notify the registered owner of the result of the inquiry."

Paragraph 2, extract No. 4, of paragraph 49, Treasury Circular No. 300, dated July 31, 1923, provides:

"Bonds registered in the name of a minor without more, or in the name of a minor by a natural guardian, as, for example 'John Jones, minor, by Henry Jones, natural guardian,' or in the name of a legal guardian for a minor, may be assigned for transfer or exchange into coupon bonds during minority only by the guardian legally appointed by a court of competent jurisdiction, or otherwise legally qualified, or pursuant to order or decree of a court of competent jurisdiction: *Provided, however,* That in cases where such bonds have been purchased by the natural guardian of the minor out of his own funds as a gift to the minor, or other-

wise purchased for the benefit of the minor and registered in the name of the minor without more, or in the name of the minor by such natural guardian, as for example, 'John Jones, minor, by Henry Smith, guardian,' and the entire gross value of the minor's estate, both real and personal, does not exceed \$500, assignments by the natural guardian for transfer or for exchange into coupon bonds may be recognized upon presentation of proof satisfactory to the Secretary of the Treasury that the proceeds of the bonds so assigned are necessary and are to be used for the support or education of the minor. (Use Form L. & C. 302.) The Secretary of the Treasury may also require in any such case a bond of indemnity with satisfactory sureties. In the event that bonds are registered in the name of a natural guardian for a minor, designated either as natural guardian or guardian, as for instance, 'John Jones, guardian of Henry Jones, a minor,' or 'John Jones, natural guardian of Henry Jones, a minor,' or a substantially similar form, assignments for transfer or exchange into coupon bonds by the natural guardian of the minor when executed under his representative title in the same form as set forth in the registration will be recognized by the Treasury Department without requiring proof of his appointment or authority to act: *Provided, however,* That no assignment by any such natural guardian to himself individually will be recognized unless accompanied by a duly authenticated copy of an order or decree of a court of competent jurisdiction specifically authorizing the assignment, in accordance with the provisions of paragraph 6 hereof."

In the absence of compliance with the above Treasury regulation, the assignment of the bond by Fred Bardwell as natural guardian (of Howard Bardwell) to the Secretary of the Treasury for exchange, is invalid, for a natural guardian has, in the absence of statute, no right to the possession or control of the infant's property, personal or real. 33 Op. 197; 28 C. J. 1127 (and cases there cited).

In 33 Op. 197, 202, Attorney General Daugherty, referring to a proposed method for the redemption of United States registered bonds or notes standing in the name of a minor upon assignment by the minor himself, or by his

natural guardian in case the minor was not of sufficient competency and understanding to execute an assignment, expressed the following opinion:

“The joining of the natural guardian, such as the father or mother, in such assignments or releases would add nothing to the security furnished the Government. Natural guardians as recognized under our laws come to us as the successor of guardians by nature of the old common law. Natural guardians, as well as guardians by nature, have a right to the care, custody, control, and education of their wards. Their rights are practically the same as the right of the parent over the child, but neither the natural guardian, the guardian by nature, nor the parent has any right whatsoever to interfere with, manage, or control the property, either real or personal, of an infant.”

In some States statutes have conferred on the natural guardian the right to possession and control of the ward's property, at least where such property was derived from the guardian, but New York is not one of those States. *Chase v. Ulster & D. R. Co. et al.*, 214 N. Y. S. 615; 215 App. Div. 581.

Notwithstanding the bond was stolen, the assignment being invalid, subsequent transferees could not obtain title as against the payee, the minor. 8 C. J. 775; *Dexter Saving Bank v. Friend*, 90 Fed. 703; *Root v. Godard*, 20 Fed. Cas. No. 12037; *Hamilton Nat. Bank v. Nye*, 37 Ind. App. 464; *Eaton v. Berlin*, 49 N. H. 219; *Andover v. Grafton*, 7 N. H. 298; *Mechanics' Bank v. New York, etc., R. Co.*, 13 New York 599; *Fearn v. Filica*, 7 M. & G. (Eng.) 513; *Wilson v. Brown*, 6 Ont. App. 411.

In 8 C. J. 775, it is said:

“That a maker or an endorser of commercial paper, purporting to act in the capacity of agent, had no authority, either real or apparent, so to act, is a defense, *regardless of the status of the holder.*” (*Underscoring supplied.*)

In *Hamilton National Bank v. Nye*, 37 Ind. App. 464, the appellee drew a check upon the Lake City Bank, payable to “Walsh, Boyle & Co., or order,” and delivered the check to the agent of the payee. At the time the check was drawn the appellee was indebted to Walsh, Boyle & Co. to

the amount of the check for goods sold by the firm to him, through their traveling salesman Underhill. The check was delivered by the appellee to Underhill who, instead of sending it to the firm, as was his duty, took the check to the Indiana National Bank and wrote the words "Walsh, Boyle & Co." across the back thereof. The bank indorsed and forwarded the check to the appellant, which in due course presented the check to the Lake City Bank for payment, which was refused, of which fact appellee had notice, and the same was duly protested. The defense was that the appellant had no right to sue on the check for the reason that the payee Walsh, Boyle & Co. was the real owner, the title never having passed to appellant. In the course of its opinion the court said (pp. 466, 467):

"The facts pleaded in the answer, if true, are a bar to the action. See *Bostwick v. Bryant* (1888), 113 Ind. 448.

* * * * *

"The maker of the check did not undertake to pay the amount of the check to any person other than Walsh, Boyle & Co., or to some person to whom this firm should order it to be paid. When the check was drawn and delivered to the firm's agent, the title was in the firm, and remained in the firm until by some act of the firm, or its authorized agent, it passed to another. An indorsement by any other person could have no effect on the firm's title. Placing the firm's name on the back of the check and delivering it to a third person would divest the firm's title and vest the title in such third person. If the agent, without the firm's knowledge, had delivered the check without any indorsement to a third person, such delivery could not effect the firm's title, but such an act could have no greater or less effect than the delivery of the check with an unauthorized indorsement.

"If appellant has any title to the check, it derived it through the Indiana National Bank. But the unauthorized indorsement and delivery of the check had no effect on the payee's title and could not therefore convey anything, as against the payee, to that bank. We have nothing to do with the respective rights of the two banks as against each other. *The purchase of the check upon a forged or unauthorized indorsement conferred no title, and in contemplation of law*

the check remained untransferred.' *Indiana Nat. Bank v. Holtsclaw* (1884), 98 Ind. 85. See, also *Graves v. American Exchange Bank* (1858), 17 N. Y. 205; *Armstrong v. National Bank* (1889), 46 Ohio St. 512, 22 N. E. 866, 15 Am. St. 655, 6 L. R. A. 625; *Levy & Salomon v. Bank of America* (1872), 24 La. Ann. 220, 13 Am. Rep. 124; *Seventh Nat. Bank v. Cook* (1873), 73 Pa. St. 483, 13 Am. Rep. 751; *Welsh v. German American Bank* (1878), 73 N. Y. 424, 29 Am. Rep. 175; *National Park Bank v. Seaboard Bank* (1889), 114 N. Y. 28, 20 N. E. 632, 11 Am. St. 612, note; *Baldwin v. Shutter* (1882), 82 Ind. 560; *Citizens State Bank v. Adams* (1883), 91 Ind. 280; *Adams v. Citizens State Bank* (1880), 70 Ind. 89; *Elliott v. Armstrong* (1829), 2 Blackf. 198, 211. (*Underscoring supplied.*)

"It is quite true it is possible that a remote indorsee might acquire a better title to a negotiable instrument, so far as available equities and defenses between the parties are concerned, than some prior indorser through whom the indorsee's title came. But the unauthorized indorsement had no effect on the payee's title to the check. The delivery of the check with the unauthorized indorsement was in effect the delivery of the check without any indorsement, and in the latter case it is clear that the check in the hands of any one, other than the payee, would not be negotiable paper according to the custom of merchants."

These authorities clearly indicate that the United States did not undertake to pay the amount of the bond to any person other than the payee, or to some person to whom the bond might be lawfully assigned; and that a purchaser of the bond upon the invalid assignment would not get title, for in contemplation of law the bond remains untransferred and retains its character as a registered bond and the protection of registration.

Where, as here, the bond retains its character as a registered bond and the protection of registration, relief may be granted under section 3704, R. S.

In 34 Op. 262, 267, it was said:

"It is clear from the restriction contained in section 3704 that it is the purpose of the statute to grant relief only where the registered bonds retain their character as registered

bonds and the protection of registration, and that when registered bonds have been so assigned as to make them payable to bearer and thereby lose the protection of registration, they may then be 'held by any person as his own property,' and when lost or stolen from the possession of their rightful owner, duplicates therefor may not be issued by the Secretary of the Treasury."

In addition to the fact that subsequent transferees of the bond can not obtain title to the same because of the invalid assignment, the Government is amply protected by section 3705, R. S., which provides:

"The owner of such missing bond shall first file in the Treasury a bond in a penal sum equal to the amount of such missing bond, and the interest which would accrue thereon, until the principal thereof becomes due and payable, with two good and sufficient sureties, residents of the United States, to be approved by the Secretary of the Treasury, with condition to indemnify and save harmless the United States from any claim because of the lost or destroyed bond."

I am, therefore, of the opinion that you are authorized by section 3704 of the Revised Statutes to issue a duplicate of the stolen bond.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE TREASURY.

BOULDER CANYON PROJECT—RATIFICATION BY UTAH

The ratification of the Colorado River compact by the State of Utah conforms to the requirements of the applicable provisions of the Boulder Canyon Project Act. (45 Stat. 1057.)

DEPARTMENT OF JUSTICE,

June 22, 1929.

SIR: I have the honor to acknowledge receipt of the letter of Acting Secretary Dixon of June 18, 1929, requesting my opinion as to whether the State of Utah has complied with the requirements of the Act of December 21, 1928, Public, No. 642, Seventieth Congress, relative to the Boulder Canyon project. (45 Stat. 1057.)

The applicable provision of the Boulder Canyon Project Act is contained in section 4 (a) thereof, and reads as follows:

"This Act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this Act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, mentioned in section 13 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within six months from the date of the passage of this Act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared, * * *." (45 Stat. 1058.)

Pursuant to an Act of August 19, 1921 (c. 72, 42 Stat. 171), the State of Utah participated in negotiations contemplated thereby, and the resulting compact, called the Colorado River compact, dated November 24, 1922, was ratified by the Legislature of that State by the Act of January 29, 1923 (Laws of Utah, 1923, c. 5). The compact provided in Article XI that it should become binding when approved by the legislatures of each of the seven signatory States and by the Congress of the United States. When it appeared to be impossible to secure the consent of all seven States, the legislature of Utah passed another Act (Laws of Utah, 1925, c. 64), waiving the provisions of Article XI of the compact and providing that it should become binding upon approval of at least six of the signatory States and the Congress, pro-

vided that similar action should be taken by the other ratifying States.

A dispute later arose between the State of Utah and the United States with respect to the title to the bed of the Colorado River and other rivers within the State. The question of title depends upon the question of navigability. If these rivers are navigable, the beds thereof belong to the State; if they are nonnavigable, the beds belong to the United States. Litigation is now pending to determine this controversy.

In 1927 the Legislature of Utah repealed chapter 64 of the Laws of 1925 (Laws of Utah, 1927, c. 1) and enacted another law (Laws of Utah, 1927, c. 9), declaring that the Colorado and Green Rivers in Utah were navigable streams and that title to the beds thereof was vested in the State of Utah. The latter Act further declared that the adherence of the State of Utah to paragraph (a) of Article IV of the Colorado River compact, which recited, in part, that "the Colorado River has ceased to be navigable for commerce," was not intended and should not be construed to be a declaration or admission that the Colorado River had ceased to be navigable for intrastate commerce, nor a relinquishment or waiver of any right, title, or interest of Utah in or to the bed of the Colorado River.

Following the enactment by Congress of the Boulder Canyon Project Act of December 21, 1928, the Utah legislature passed another Act (Laws of Utah, 1929, c. 31), approved March 6, 1929, which again waived the provisions of Article XI of the compact and provided that it should become binding whenever at least six of the signatory States, including the State of California, should have approved it "without condition save that of six-State approval" and Congress should have given its consent and approval, provided that a similar Act should be adopted by six of the signatory States, including California.

The purpose of chapter 9 of the 1927 Laws of Utah seems to have been to relieve the State of an admission in the compact which might be prejudicial to the position of the State in its litigation with the United States. But with respect to the adherence of the State to the compact, the latest enactment, chapter 31 of the 1929 Laws approved March

6, 1929, clearly shows that the Legislature intended the ratification by that State to be "without condition save that of six-State approval."

For the foregoing reasons, I have the honor to advise you that in my opinion the ratification of the Colorado River compact by the State of Utah conforms to the requirements of the applicable provisions of the Boulder Canyon Project Act.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE INTERIOR.

TRANSFER OF NATIONAL MONUMENTS TO NATIONAL PARK
SERVICE IN THE DEPARTMENT OF THE INTERIOR

It is not within the Executive authority to transfer the national monuments now under administration of the War Department and the Department of Agriculture to the National Park Service in the Department of the Interior.

DEPARTMENT OF JUSTICE,

July 8, 1929

SIR: I have the honor to acknowledge receipt of your letter of May 15, 1929, asking to be advised whether it is within Executive authority to transfer the national monuments, now under the administration of the War Department and the Department of Agriculture, to the National Park Service in the Department of the Interior.

I understand that there are now about sixty-one national monuments, as distinguished from national parks and other reservations, of which fourteen are administered by the Secretary of War, fifteen by the Secretary of Agriculture, and the remainder by the Secretary of the Interior.

With few exceptions, these national monuments have been created by Presidential proclamations under the authority of section 2 of the Act of June 8, 1906, c. 3060, 34 Stat. 225 (U. S. C., title 16, section 431), entitled "An act for the preservation of American antiquities," which provides:

"That the President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are

situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected: *Provided*, That when such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is hereby authorized to accept the relinquishment of such tracts in behalf of the Government of the United States."

In exceptional cases, reservations now generally classified as national monuments have been created directly by Acts of Congress. Such are the Act of March 4, 1907, c. 2928, 34 Stat. 1411, with respect to the completion of a monument to the memory of soldiers who fell in the Battle of New Orleans, now generally known as the Chalmette National Monument, and the Act of March 3, 1925, c. 425, 43 Stat. 1109, with respect to the restoration of Fort McHenry, Maryland.

Since the Constitution (Article IV, section 3, clause 2) vests in Congress the "Power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," the directions of Congress are controlling with respect to the administration of territories set apart as reservations for various purposes. Where Congress has itself designated the supervising authority, either expressly or by fair implication, it is not within Executive authority to alter such designation.

It is to be observed that section 2 of the Act of June 8, 1906, above quoted, contains no language expressly designating the executive departments which are to have jurisdiction over the national monuments which the President is authorized to create by proclamation. It does not necessarily follow, however, that Congress intended to vest in the President authority to make such designation. The national monuments created under that section must be "situated upon the lands owned or controlled by the Government of the United States." All such lands are under the juris-

diction of some executive department. Such of them as are military reservations or national military parks are under the jurisdiction of the Secretary of War. Those which are national forests are under the jurisdiction of the Secretary of Agriculture. Most of the remainder are under the jurisdiction of the Secretary of the Interior, either because they are national parks over which he has been given jurisdiction by direct Act of Congress or because they are unreserved public lands.

Other provisions of the Act of June 8, 1906, indicate that Congress intended that jurisdiction to administer the national monuments which the President was thereby authorized to create should reside in the Departments which had jurisdiction respectively of the land within which the monuments were located. Thus, section 1 of the Act provides for the punishment of any persons "who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated * * *." Section 3 provides that permits for the examination of ruins, excavation of archæological sites, and gathering of objects of antiquity "upon the lands under their respective jurisdictions may be granted by the Secretaries of the Interior, Agriculture, and War" to institutions and under conditions therein described. And section 4 provides that "the Secretaries of the Departments aforesaid shall make and publish from time to time uniform rules and regulations for the purpose of carrying out the provisions of this Act."

The Secretaries of the Interior, Agriculture, and War did promulgate such rules and regulations on December 28, 1906. Section 1 thereof provides:

"Jurisdiction over ruins, archeological sites, historic and prehistoric monuments and structures, objects of antiquity, historic landmarks, and other objects of historic or scientific interest shall be exercised under the act by the respective departments as follows:

"By the Secretary of Agriculture over lands within the exterior limits of forest reserves, by the Secretary of War

over lands within the exterior limits of military reservations, by the Secretary of the Interior over all other lands owned or controlled by the Government of the United States, provided the Secretaries of War and Agriculture may by agreement cooperate with the Secretary of the Interior in the supervision of such monuments and objects covered by the act of June 8, 1906, as may be located on lands near or adjacent to forest reserves and military reservations, respectively."

The National Park Service was created in the Department of the Interior, under the charge of a Director to be appointed by the Secretary of the Interior, by the Act of August 25, 1916, c. 408, 39 Stat. 535 (U. S. C., title 16, sec. 2). Its jurisdiction is defined in section 2 as follows:

"That the director shall, under the direction of the Secretary of the Interior, have the supervision, management, and control of the several national parks and national monuments which are now under the jurisdiction of the Department of the Interior, and of the Hot Springs Reservation in the State of Arkansas, and of such other national parks and reservations of like character as may be hereafter created by Congress: *Provided*, that in the supervision, management, and control of national monuments contiguous to national forests the Secretary of Agriculture may cooperate with said National Park Service to such extent as may be requested by the Secretary of the Interior."

Congress thus recognized that there were national monuments which would not be under the jurisdiction of the National Park Service.

Certain national monuments are within national military parks, governed by the Act of May 15, 1896, c. 182, 29 Stat. 120 U. S. C. Title 16, sections 411 and 412), which declared them to be national fields for military maneuvers, to be opened for such purposes only in the discretion of the Secretary of War and under such regulations as he might prescribe, and authorized the Secretary of War to assemble there, in his discretion, such portions of the military forces of the United States as he might think best for purposes of military training. In later Acts Congress has similarly recognized the jurisdiction of the War Department over cer-

tain national monuments. For example, the Appropriation Act of April 15, 1926 (c. 146, 44 Stat. 254, 290), contains an appropriation "For maintaining and improving national monuments established by proclamation of the President under the Act of June 8, 1906 (Thirty-fourth Statutes, page 225), and administered by the Secretary of War, including Fort McHenry, Maryland, * * *."

Congress itself possesses, and has exercised, power to change the status of national monuments. Thus a part of the Grand Canyon, in Arizona, was established as a national monument by Executive order of the President on January 11, 1908. By the Act of February 26, 1919 (c. 44, 40 Stat. 1175), Congress set apart those lands, with others, as the "Grand Canyon National Park," to be administered, under the direction of the Secretary of the Interior, by the National Park Service, and revoked the Executive order of January 11, 1908. Congress has, however, conferred no authority on the President to make changes in their administration. Last year a bill (S. 4173, 70th Cong., 1st sess.) to transfer jurisdiction over certain national military parks and national monuments from the War Department to the Department of the Interior was introduced in Congress, but failed of passage.

This Department has frequently ruled that, in the absence of authority from Congress, the President may not restore to the public domain lands which have been reserved for a particular purpose (10 Op. 359; 16 Op. 121, 123; 17 Op. 168; 21 Op. 120), nor transfer their control from one Department to another (28 Op. 143).

I have the honor, therefore, to advise you that I am of the opinion that it is not within the Executive authority to transfer the national monuments now under the administration of the War Department and the Department of Agriculture to the National Park Service in the Department of the Interior.

Respectfully,

WILLIAM D. MITCHELL.

To the PRESIDENT.

MISSISSIPPI FLOOD-CONTROL PROJECT

The legal project to be executed under the provisions of the Mississippi Flood Control Act, (45 Stat. 534), is the project set forth in House Document No. 90, Seventieth Congress, first session; and this project is fixed and not subject to review or change by this administration.

The Attorney General declines to express an opinion upon the question whether the United States is required to provide compensation for flowage rights in the Boeuf and Atachafalaya Basins, as litigation involving this precise question is now pending in the Federal courts.

DEPARTMENT OF JUSTICE,

July 19, 1929.

SIR: In the matter of your inquiry of May 27, 1929, concerning certain questions arising under the Act of May 15, 1928, 70th Congress, 1st Session, otherwise known as the Mississippi Flood Control Act, I have the honor to advise you as follows:

I

Your first question is whether the project in House Document, 70th Congress, 1st Session, is the legal project to be executed in accordance with law, and whether this project is already fixed and not subject to review by this administration.

Section 1 of the Act reads as follows:

"An Act For the control of floods on the Mississippi River and its tributaries, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, and printed in House Document Numbered 90, Seventieth Congress, first session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: Provided, That a board to consist of the Chief of Engineers, the president of the Mississippi

River Commission, and a civil engineer chosen from civil life to be appointed by the President, by and with the advice and consent of the Senate, whose compensation shall be fixed by the President and be paid out of the appropriations made to carry on this project, is hereby created; and such board is authorized and directed to consider the engineering differences between the adopted project and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927, and after such study and such further surveys as may be necessary, to recommend to the President such action as it may deem necessary to be taken in respect of such engineering differences and the decision of the President upon all recommendations or questions submitted to him by such board shall be followed in carrying out the project herein adopted. The board shall not have any power or authority in respect to such project except as hereinbefore provided. Such project and the changes therein, if any, shall be executed in accordance with the provisions of section 8 of this Act. Such surveys shall be made between Baton Rouge, Louisiana, and Cape Girardeau, Missouri, as the board may deem necessary to enable it to ascertain and determine the best method of securing flood relief in addition to levees, before any flood control works other than levees and revetments are undertaken on that portion of the river: *Provided*, That all diversion works and outlets constructed under the provisions of this Act shall be built in a manner and of a character which will fully and amply protect the adjacent lands: *Provided further*, That pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway, but nothing herein shall prevent, postpone, delay, or in anywise interfere with the execution of that part of the project on the east side of the river, including raising, strengthening, and enlarging the levees on the east side of the river. The sum of \$325,000,000 is hereby authorized to be appropriated for this purpose.

"All unexpended balances of appropriations heretofore made for prosecuting work of flood control on the Mississippi

River in accordance with the provisions of the Flood Control Acts approved March 1, 1917, and March 4, 1923, are hereby made available for expenditure under the provisions of this Act, except section 13." (45 Stat. 534.)

From an examination of the foregoing section there can be no question but that a project is contemplated, and that such project is identified as the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War, dated December 1, 1927, and known as House Document 90, Seventieth Congress, First Session.

The fact that a board is therein created to consider the engineering differences between the above project and the plan recommended by the Mississippi River Commission in a special report dated November 28, 1927, such board to make recommendations thereon to the President, the President being empowered to decide all recommendations or questions submitted to him by such board, does not alter the fact that the Act of Congress made the engineering plan referred to, dated December 1, 1927, and printed in House Document 90, the project to be thereafter executed, as provided in the Act.

The Act refers to such project several times as "the project," "the adopted project," "such project," "project herein adopted," "this project," showing that Congress contemplated and intended authorizing a specific project, which is identified by the Act as the aforesaid engineering plan dated December 1, 1927, and printed in House Document 90.

In my opinion the project thus authorized by the Act of May 15, 1928, is thus identified and now fixed and is not subject to change save by future congressional action.

It appears from Section 1 of the Act quoted above that in addition to the plan submitted by the Chief of Engineers under date of December 1, 1927, another plan had been recommended by the Mississippi River Commission in its special report dated November 28, 1927, and that there were certain engineering differences between it and the plan of December 1, 1927. It is evident that Congress did not wish to pass upon these engineering differences, and therefore created a special board which "is authorized and directed to consider the *engineering* differences between the adopted project and

the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927." It is made the duty of the board, after giving such engineering differences due consideration, "to recommend to the President such action as it may deem necessary to be taken in respect to such engineering differences." The Act then provides that the foregoing function on the part of such special board was the limit of its authority.

We have then the adoption of a particular project by Congress. We have certain *engineering* differences existing between that project and another distinct plan. A board is created to examine into these engineering differences and report its recommendation to the President, thus completing the full duty of such special board.

It must be kept in mind that only "the engineering differences" are to be inquired into, all other differences between the plans, if any, having been definitely resolved by Congress in favor of the plan of December 1, 1927, so that the field of review on the part of the special board was specifically limited, and while the special board undoubtedly had some latitude in connection with its consideration of such engineering differences, nevertheless the function of the board was required to result in a recommendation to be finally made to the President, after which "the decision of the President upon all recommendations or questions submitted to him *by such board* shall be followed in carrying out the project herein adopted." This power of decision is only on "engineering differences," not on questions of legal rights, duties, or liabilities. Questions such as the obligation to provide flowage rights, or to make compensation in connection therewith, do not fall within the term "engineering differences."

The further language of the Act specifically stating that "the board shall not have any power or authority in respect to such project except as hereinbefore provided" necessitates the conclusion that when the board shall have made its recommendation to the President, and the President shall have acted thereon, the full function of the board will have been fulfilled, and the board will have no further power, and therefore no further reason for existence. I am advised that

this is precisely the construction placed upon the Act by Executive authority, inasmuch as the compensation to be paid the civil member of the board was apportioned so that the final payment thereof was to be made upon action by the President on the findings of the Board.

It further appears that President Coolidge received the recommendations of the special board, considered them, and acted upon each and all of them, and that various steps have been taken by the officials in charge of the project, based upon the decisions of President Coolidge just referred to. In some instances surveys have been made; in some instances contracts have been let; in some instances bids have been advertised for.

Nowhere in the Act does it appear that any latitude whatever is permitted with respect to the project covered by the Act, save and except as is provided for in connection with the recommendations of the special board and the decision of the President thereunder. As pointed out heretofore, the board having acted and completed its duties and the President having made his decision upon such recommendations of such special board, and such decision having been acted upon to a greater or less extent by the officers in charge of the project, it would seem that the project covered by the Act has now become fixed and definite with no power of modification or change, except as provided in the project itself, by any authority save the Congress.

The Flood Control Act requires the President, upon receiving the report from the special board, to decide upon the recommendations of the special board. The decisions thus made by the President are evidently intended under the Act to become a part of the project authorized by the Act. Former Attorney General Bates in 10 Op. 469 held that—

“Where an Act of Congress, establishing a general system, confers on the President the authority to do a specific act for the purpose of perfecting the means by which that system shall be carried into effect, the act of the President, when performed according to the terms of the statute, has all the validity and authority of the statute itself. It has the same force and sanction as if it had been directly embodied in the law which authorized it.

* * * * *

"If, then, the act of the President, in a case of this kind, has the same force and authority as if it were embodied in the statute, it follows, in my opinion, that after that act is completed and made part of the system established by the statute, it can only be altered or annulled by the same power which originally gave it validity, viz: the legislative power."

The point involved was a statute which left to the President the power of modifying the arrangement of collection districts. The Attorney General held that the act of the President, when performed, had all the validity and authority of the statute itself, and that the system established by the President under such power became the system established by the Act, and the power of the President was exhausted.

In such circumstances, it has been frequently ruled by this Department that final action taken by the President or head of a Department is not subject to modification or review by his successor. See, for example, 17 Op. 76; 16 Op. 489; 13 Op. 387; 6 Op. 603.

For the above reasons, I am of the opinion that the project set forth in House Document No. 90, 70th Congress, 1st Session, is the legal project to be executed in accordance with the law, and that this project is fixed and not subject to review or change by this administration.

II

In respect to your remaining inquiry as to the necessity of providing compensation for flowage rights in the Boeuf and Atachafalaya Basins, I beg to advise you that there are now pending in the Federal courts having proper jurisdiction, various suits against the Secretary of War and others, involving the judicial determination of the precise question thus presented by you, and in accordance with a rule of long standing in this Department I must respectfully decline to express any opinion on your question with respect to the purchase of flowage rights, that being one of the precise issues in the pending litigation above referred to.

Respectfully,

WILLIAM D. MITCHELL.

TO THE SECRETARY OF WAR.

ACQUISITION BY THE UNITED STATES OF LAND WITHIN
THE STATE OF NEW YORK

The Act of New York of April 17, 1896 (Laws 1896, c. 391), and the Act of New York of April 5, 1899 (Laws 1899, c. 242), as they have been respectively amended, express the consent of the legislature of the State of New York to the acquisition of land by the United States within their respective limitations.

The Act of April 5, 1899, *supra*, should be complied with in the matter of sites, not exceeding 2 acres in extent, for "post offices and other governmental offices" in cities or villages, as has been done in the past; and the Act of April 17, 1896, *supra*, should be complied with in the matter of other acquisitions of land embraced within the scope of its language.

DEPARTMENT OF JUSTICE,
August 26, 1929.

SIR: I have the honor to acknowledge receipt of your letter of July 1, 1929, requesting my opinion upon the procedure to be followed in obtaining the consent of the Legislature of the State of New York to acquisitions of land therein by the United States, in accordance with the direction of section 355 R. S. (U. S. C. Tit. 40, sec. 255).

The Act of April 17, 1896, of the Legislature of New York (Laws 1896, c. 391), gave such consent to the acquisition by the United States of parcels of land within the State, "situate upon or adjacent to the navigable waters thereof, for the purpose of erecting thereon lighthouses, beacons, lighthouse keepers' dwellings, works for improving navigation, post offices, customhouses, fortifications." This became Article IV, Chapter LVII, of the Consolidated Laws (Laws 1909, c. 59). It was amended by Laws 1910, c. 109; Laws 1911, c. 527; Laws 1917, c. 819; Laws 1922, c. 14; and now reads as follows (the underscored words having been added by the various amendments and the bracketed words having been eliminated by the amendment of April 19, 1910).

"The consent of the State of New York is hereby given to the purchase by the Government of the United States, and under the authority of the same, of any tract, piece or parcel of land from any individual or individuals, bodies politic or corporate within the boundaries of this State, [situate upon or adjacent to the navigable waters thereof] for the purpose of *parade or manoeuver grounds, aviation fields, navy yards and naval stations, or for the purpose of*

erecting thereon lighthouses, beacons, lighthouse keepers' dwellings, *hospitals, sanatoriums*, works for improving navigation, post offices, customhouses, fortifications, *or buildings and structures for the storage, manufacture or production of supplies, ordinance, apparatus or equipment of any kind whatsoever for the use of the army or navy, and any other needful buildings and structures*, and all deeds, conveyances or other papers relating to the title thereof shall be recorded in the office of the register, *if any, or if not in the office of the county clerk*, of the county where the said lands are situated."

Under section 3, when there shall have been duly filed and recorded in the office of the secretary of state of the State of New York certified copies of the record or transfer to the United States of lands acquired under the Act, together with maps or plats, descriptions by metes and bounds, and a certificate of the Attorney General of the United States that the United States is in possession under a clear and complete title, etc., the governor of the State "is authorized, if he deems it proper, to execute in duplicate, in the name of the State and under its great seal, a deed or release of the State ceding to the United States the jurisdiction of said tracts or parcels of land as hereinafter provided." Section 8 provides that the statute shall not apply to the county of Orange.

The Act of April 5, 1899 (Laws 1899, c. 242), gave consent to acquisition by the United States of parcels of land not exceeding 2 acres in extent, within cities of the State, for the purpose of erecting public buildings for "post offices and other Government offices." It was amended by Laws 1907, c. 375, so as to include villages and, so amended, was incorporated as Article XI, Chapter XXIV, in the Consolidated Laws (Laws 1909, c. 29). It now reads as follows:

"The United States is hereby authorized to acquire by condemnation, purchase or gift in conformity with the laws of this State, one or more pieces of land not exceeding 2 acres in extent, in any city or village of this State, for the purpose of erecting and maintaining thereon a public building for the accommodation of post offices and other governmental offices in any such city or village."

Section 2 provides that when certified copies of the record or transfer to the United States shall have been duly filed and recorded in the office of the secretary of state of New York, together with maps and descriptions by metes and bounds, "exclusive jurisdiction * * * is thereupon ceded to the United States over the land so described, during the time that the United States shall be or remain the owner thereof."

Writing you upon this same subject on April 4, 1916, the Attorney General stated the following conclusions:

"Both of these acts express the consent of the State of New York to the acquisition by the United States, for various purposes, of lands therein situated, and, in my opinion, satisfy the requirements of section 355, R. S. (24 Op. 617; 15 Op. 480; 7 Op., 628).

* * * * *

"I am of opinion that the formalities prescribed in section 2 of the last-mentioned Act [April 5, 1899] for the purposes of evidencing such consent should be followed in case property is acquired in cities or villages for the erection of a Federal building for the accommodation of post offices and other governmental offices of the kind and character described in your communication.

"In case lands are acquired for purposes other than those above mentioned, and which are enumerated in the first section of the Act of April 17, 1896, as amended, the formalities prescribed in section 3 of that Act should be followed."

Since that time the amendment of 1917 has added the words "aviation fields * * * or buildings and structures for the storage, manufacture, or production of supplies, ordnance, apparatus, or equipment of any kind whatsoever for the use of the Army or Navy," and the amendment of 1922 has added the words "hospitals, sanatoriums * * * and any other needful buildings and structures," in the places where they now appear in the statute.

The amendment of 1922 apparently was prompted by the following request addressed to the Governor of New York by the Secretary of the Treasury under date of January 16, 1922:

"I have the honor to request you to recommend to the State legislature in its present session the passage of a special Act providing for cession of State jurisdiction (as in the case of the site for the marine hospital at Stapleton, Staten Island, New York, for which a special Act of cession was passed March 27, 1903) over the hospital lands herein described, and over such other lands as may hereafter be acquired by the Federal Government for hospital or sanatorium purposes within the State of New York; or, preferably, the passage of an amendment to the general cession law of 1896, *supra*, so as to grant prior general consent to the purchase of land required 'for any purpose of the Government', or for 'needful public buildings', in whatever terms are considered most applicable to remove the limitation to the particular classes of buildings enumerated in the said law."

It is suggested that the Act of April 17, 1896, thus amended, is now so broad as to cover all requirements for Federal building sites, including sites "for post offices and other governmental offices" in cities and villages, heretofore considered to be provided for by the Act of April 5, 1899, so that the latter statute need no longer be considered, and it is upon this precise question, I understand, that you desire my opinion.

In so far as post-office sites are concerned, it is clear that nothing which has happened since the opinion of April 4, 1916, need affect the conclusion there reached. The Act of April 17, 1896, has always purported to cover post-office sites, and the original limitation to parcels of land upon or adjacent to navigable waters had been stricken out by the amendment of April 19, 1910. With respect to sites for "other governmental offices" in cities and villages, also covered by the Act of April 5, 1899, there is no apparent reason for a different conclusion.

I find no express repeal of that statute, nor any implied repeal in the subsequent legislation. To the extent that it is applicable it has heretofore been availed of. It provides for cession of jurisdiction upon the filing of the prescribed documents; the other statute merely authorizes the governor, "if he deems it proper," to execute a deed of cession. It

applies, apparently, to acquisitions of land within any city or village of the State; the other expressly excludes Orange County—and even now the United States is negotiating the purchase of a post-office site in Newburg, Orange County

I must, therefore, conclude now, as this Department did in 1916, that both the Act of April 17, 1896, and the Act of April 5, 1899, as they have been respectively amended, express the consent of the legislature of the State of New York to the acquisition of land by the United States within their respective limitations; that the latter should be complied with in the matter of sites, not exceeding 2 acres in extent, for "post offices and other governmental offices" in cities or villages, as has been done in the past, and that the former should be complied with in the matter of other acquisitions of land embraced within the scope of its language.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE TREASURY.

FEDERAL RESERVE SYSTEM—STATE MEMBER BANKS
ESTABLISHING OR ACQUIRING FOREIGN BRANCHES

- A State member bank of the Federal reserve system can not, since February 25, 1927, establish a branch in a foreign country and continue to hold stock in a Federal reserve bank.
- A State member bank of the Federal reserve system can not acquire a branch established in a foreign country since February 25, 1927, by consolidating with a State bank which has absorbed or taken over a liquidating national bank having such foreign branch and continue to retain stock in the Federal reserve bank.

DEPARTMENT OF JUSTICE,
August 28, 1929.

SIR: I have the honor to comply with your request of June 13, 1929, for an expression of my opinion in regard to the following questions submitted by you:

"(1) Whether a State member bank of the Federal reserve system may, since February 25, 1927, establish a branch in a foreign country and continue to hold stock in a Federal Reserve Bank; and

“(2) Whether a State member bank of the Federal reserve system may acquire a branch in a foreign country by consolidating with a State bank which has absorbed or taken over a liquidating national bank having such a foreign branch established since February 25, 1927, in the manner described, and continue to retain stock in the Federal reserve bank.”

You state that the Federal Reserve Board is confronted with the question whether a State member bank of the Federal reserve system, since February 25, 1927, may establish a branch in a foreign country or may acquire a branch which has been established since that date, and at the same time continue to hold stock in a Federal reserve bank. It is further stated that a certain State member bank of the Federal reserve system desires to establish or acquire a branch in a foreign country, and that the bank is authorized under the laws of the State of its organization to establish a foreign branch.

The applicable provision of the Federal Reserve Act is contained in section 9 thereof (38 Stat. 259), as amended by the Act of February 25, 1927, c. 191, 44 Stat. 1224, 1229, which provides:

“Any bank incorporated by special law of any State, or organized under the general laws of any State or of the United States, desiring to become a member of the Federal reserve system, may make application to the Federal Reserve Board, under such rules and regulations as it may prescribe, for the right to subscribe to the stock of the Federal reserve bank organized within the District in which the applying bank is located. Such application shall be for the same amount of stock that the applying bank would be required to subscribe to as a national bank. The Federal Reserve Board, subject to the provisions of this Act and to such conditions as it may prescribe pursuant thereto may permit the applying bank to become a stockholder of such Federal reserve bank.

“Any such State bank which, at the date of the approval of this Act, has established and is operating a branch or branches in conformity with the State law, may retain and operate the same while remaining or upon be-

coming a stockholder of such Federal reserve bank; but no such State bank may retain or acquire stock in a Federal reserve bank except upon relinquishment of any branch or branches established after the date of the approval of this Act beyond the limits of the city, town, or village in which the parent bank is situated."

The answers to your questions are found in the construction to be given to the second paragraph of the above-quoted section. If that section has no relation to the establishment of branches in foreign countries by member banks, as contended by attorneys for the applying bank, then the request of the applicant may be granted. However, if the statute means what its language would ordinarily imply, then such State member bank may not now establish a branch, or acquire a branch or branches, established subsequent to February 25, 1927, beyond the limits of the city or town in which the parent bank is situated, and at the same time retain its stock in the Federal reserve bank.

Where the language of a statute is clear and unambiguous, it is the duty of a court to expound the statute as it stands, even if the consequence works a hardship or injustice. *United States v. Alger*, 152 U. S. 384, 397; *Hamilton v. Rathbone*, 175 U. S. 414, 421.

In *Lake County v. Rollins*, 130 U. S. 662, 670, the Court said:

"* * * where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

As stated by Mr. Justice Day, speaking for the court, in *Adams Express Co. v. Kentucky*, 238 U. S. 190, 199:

"It is elementary that the first resort, with a view to ascertaining the meaning of a statute, is to the language used. If that is plain there is an end to construction and the statute is to be taken to mean what it says."

The language of the second paragraph of section 9 of the Federal Reserve Act, as amended, *supra*, is plain and unambiguous, and under accepted rules of statutory construction it must be taken to mean what it says, that is,

to restrict State member banks in the establishment of branches to the limits of the city, town, or village in which the parent bank is situated.

Section 7 of the McFadden Banking Act amending section 5155 of the Revised Statutes, relating to branches of national banks, contained the following:

“(f) The term ‘branch’ as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.” (44 Stat. 1229.)

It has been contended that this section shows that in dealing with branch banks Congress had in mind only branches or places within the United States, but the underlying words show that the subdivision only dealt with the word “branch” as used in that section and not as used elsewhere.

It is apparent also from the terms of the Act of February 25, 1927, *supra*, that Congress did consider the question of the establishment of foreign branches because section 7 (g) of that Act provides:

“This section shall not be construed to amend or repeal section 25 of the Federal Reserve Act, as amended, authorizing the establishment by national banking associations of branches in foreign countries, or dependencies, or insular possessions of the United States.”

Congress made no such specific exception in respect to State member banks.

Section 9 of bill H. R. 2, 69th Congress, 1st session, known as the McFadden bill, which subsequently became the Act of February 25, 1927, as it passed the House of Representatives, contained an additional paragraph defining the term “branch or branches” as not including “any branch established in a foreign country or dependency or insular possession of the United States.” This paragraph was stricken from the bill by the Senate Committee on Banking and Currency and the statute as finally enacted contained only the above-quoted exception respecting national banks. The rejection by Congress of a specific provi-

sion contained in the Act as originally reported suggests that the Act should not be so construed as in effect to include that provision. *Pennsylvania R. R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 198.

In your second question you request to be advised whether a State member bank may acquire a branch established in a foreign country since February 25, 1927, by consolidating with a State bank which has absorbed or taken over a liquidating national bank having such foreign branch. To answer that question in the affirmative would be to hold that a State member bank may do indirectly that which it may not do directly. Section 9 of the Federal Reserve Act prohibits such bank from acquiring or retaining stock in a Federal reserve bank if it should establish or acquire a foreign branch which has been established subsequent to the date of said Act. It is immaterial how the foreign branch is acquired. To acquire one by acquiring the assets of a national bank with a foreign branch is as much within the ban of the statute as if any other method of acquisition were used.

It has also been urged that Congress could not have intended to discriminate against State member banks by denying them what is allowed to national banks, and that no reason for such discrimination is apparent.

Section 25 of the Federal Reserve Act places limitations and conditions on the right of national banks to establish foreign branches, and to have allowed State member banks to establish foreign branches, subject only to the provisions of State laws under which they are organized, might have seemed to Congress objectionable. But, however that may be, the words of the statute are explicit, and if any oversight or mistake occurred in framing it, Congress must be looked to for amendment. We can not disregard its plain provisions.

I have the honor to advise you, therefore, that both of your questions must be answered in the negative.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE TREASURY.

PHILIPPINE ISLANDS—LEGALITY OF BOND ISSUE

The proposed issue by the Government of the Philippine Islands of bonds of the face value of \$1,500,000, the proceeds from the sale of which are to be used in the purchase of an equivalent amount of bonds of the Metropolitan Water District, being authorized by Act No. 3255 of the Philippine Legislature of December 3, 1925, and being within the limit of indebtedness authorized by Congress, and all statutory requirements regarding the issue of the bonds having been complied with, and the form of the bond submitted being in substantial compliance with the law authorizing the issue, said bonds, when issued in the form and amount proposed, will have been legally issued and will be valid and binding obligations of the Government of the Philippine Islands.

DEPARTMENT OF JUSTICE,

October 4, 1929.

SIR: I have the honor to acknowledge receipt of your letter of August 14, 1929, requesting my opinion on the legality of the proposed issue, by the Government of the Philippine Islands, of bonds of the face value of \$1,500,000, the proceeds from the sale of which are to be used in the purchase of an equivalent amount of bonds of the Metropolitan Water District, a public corporation created by Act of the Philippine Legislature No. 2832, approved March 6, 1919. By said Act the Metropolitan Water District is created for the purpose of supplying water and sewerage service to the inhabitants of said district, and is given authority to incur indebtedness and issue bonds, the payment of which is guaranteed by the Government of the Philippine Islands.

You state that the proposed bonds of the Philippine Government are to be issued in compliance with the request of the Governor General of the Philippine Islands, upon the recommendation of the Secretary of Finance and pursuant to authority contained in Act No. 3255 of the Philippine Legislature, approved December 3, 1925, and section 11 of the Act of Congress approved August 29, 1916 (c. 416, 39 Stat. 548), as amended by Act of May 31, 1922 (c. 203, 42 Stat. 599). Section 1 of Act No. 3255 provides in part:

“The Secretary of War is hereby authorized to issue in the name and behalf of the Government of the Philippine Islands bonds in the amount of another three million dollars

the proceeds of the sale of which shall be used by said Government for the purchase of an equivalent par amount of bonds of the Metropolitan Water District to be issued for the purpose of obtaining funds for the completion of the extension of the water supply and sewerage systems of said district.

“The bonds so authorized to be issued shall bear such date and be in such form as the Secretary of War may determine and shall bear such rate of interest and run for such length of time as may be determined by said official. Both principal and interest shall be payable in gold coin of the United States at the Treasury of the United States and the interest shall be payable at such periods as the Secretary of War may determine. Said bonds shall be issued at times and in amounts to be determined by the Governor General upon the recommendation of the Secretary of Finance, and they may be coupon bonds or registered bonds, convertible, in the discretion of the Secretary of War, into either form, and in the case of the issue or transfer of any registered bonds the same shall be registered in the Treasury of the United States. These bonds may be issued in series bearing different dates.”

Section 3 of the Act provides that the proceeds of the sale of said bonds are appropriated for the purpose of purchasing bonds issued by the Metropolitan Water District. Section 4 creates a sinking fund for the payment of the bonds at maturity, and section 5 makes a permanent annual appropriation out of the general funds in the Treasury of the Philippine Islands of such sums as may be necessary to provide for the sinking fund created by section 4 and for the payment of the interest on the bonds issued pursuant to said Act as the same become due.

Section 11 of the Act of August 29, 1916, as amended by Act of May 31, 1922, *supra*, provides:

“* * * where necessary to anticipate taxes and revenues, bonds and other obligations may be issued by the Philippine Government or any provincial or municipal government therein, as may be provided by law and to protect the public credit: Provided, however, That the entire indebtedness of the Philippine Government created by the authority conferred herein, exclusive of those obligations

known as friar land bonds, shall not exceed at any one time 10 per centum of the aggregate tax valuation of its property, nor that of the city of Manila 10 per centum of the aggregate tax valuation of its property, nor that of any Province or municipality, a sum in excess of 7 per centum of the aggregate tax valuation of its property at any one time. In computing the indebtedness of the Philippine Government, bonds not to exceed \$10,000,000 in amount, issued by that Government, secured by an equivalent amount of bonds issued by the Provinces or municipalities thereof, shall not be counted."

While Act No. 3255 of the Philippine Legislature, *supra*, authorizes the issue of bonds in the amount of three million dollars for the purposes indicated in said Act, you state that but \$1,500,000 of such bonds are to be presently issued; that they are to be issued in coupon form of the denomination of \$1,000 each, bearing interest at the rate of 4½ per cent per annum, payable semiannually, to be dated October 1, 1929, and to mature on October 1, 1959.

You also state that the assessed valuation of taxable real property of the Philippine Islands on December 31, 1928, was \$860,514,528.50; that the present bonded indebtedness of the Philippine Government, exclusive of collateral bonds aggregating \$6,986,500 which are secured by an equivalent amount of bonds issued by its provinces and municipalities, and of friar lands purchase bonds aggregating \$5,117,000, is \$63,323,000 and that on February 28, 1929, there had accumulated in the various sinking funds for the payment of said bonded indebtedness the aggregate sum of \$10,426,033.16. It is therefore apparent that the proposed bonds when issued, together with the bonded indebtedness heretofore incurred, will not exceed the amount authorized by Congress.

The recital in the form of bond submitted with your letter with respect to tax exemption follows the language of section 1 of the Act of Congress approved February 6, 1905 (c. 453, 33 Stat. 689).

I find that all of the statutory requirements regarding the issue of the bonds by the Philippine Government for the purposes stated have been complied with and that the

form of bond submitted with your letter is in substantial compliance with the law authorizing the issue. It is my opinion, therefore, that when issued in the form and amount proposed said bonds will have been legally issued and will be valid and binding obligations of the Government of the Philippine Islands.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF WAR.

TRUST OF RESTRICTED INDIAN FUNDS

A trust of restricted Indian funds can not be created by agreement of the Indian and a trust company with the approval of the Secretary of the Interior.

The Secretary, however, has the power to remove restrictions from certain Indian funds and, where the restrictions are removed from any such fund and the fund is released to the Indian, the Indian may use the fund as he sees fit, and if he desires to create a private trust of it by agreement with a trust company, there is no legal objection to his doing so.

DEPARTMENT OF JUSTICE,

October 5, 1929.

SIR: I have the honor to comply with your request of August 17, 1929, for my opinion as to whether a trust of restricted Indian funds may be created by agreement of the Indian and a trust company with the approval of the Secretary of Interior. By "restricted Indian funds" is meant moneys coming into the control of the Secretary of the Interior from the proceeds, including income, from lands allotted in severalty to the Indians, as well as certain funds created by individual distributions to the Indians, upon which funds and with reference to which Indians Congress has defined and fixed certain limitations of power. I understand that your question refers, and I have considered, funds of the Quapaws, Five Civilized Tribes, and the Osages, only.

The Secretary of the Interior has only such power over Indian property as Congress has, necessarily or by implication, confided in him. Congress has, however, for many years placed supervision over Indian affairs in the Secretary of the Interior, as indicated in the Act of March 3, 1849,

(9 Stat. 395) and sections 441 and 463 of the Revised Statutes of 1878. Under the early statutes, various restrictions were placed upon Indian properties, and certain time-limitations fixed, within which such restrictions might not be removed. (For example, see 24 Stat. 388.) Under these statutes, the Secretary of the Interior was not empowered to consent to the release of the restrictions thus imposed. Later, however, Congress passed statutes which to some extent permitted the removal of certain restrictions, subject to the approval of the Secretary of the Interior. Among such statutes may be noted 32 Stat. 275, 34 Stat. 1018, 37 Stat. 678.

Congress provided that the Secretary of the Interior might in his discretion issue patents in fee simple to Indians found competent to manage their own affairs. (See 34 Stat. 182, 35 Stat. 444, 36 Stat. 855.) Moreover, Congress has in a number of statutes contemplated the power of Indians to lease properties allotted to or inherited by them under such rules and regulations as the Secretary of the Interior might prescribe. (28 Stat. 305.)

In 34 Stat. 1018, Congress directs that the proceeds derived from the sale of allotted or inherited lands shall be used for the benefit of the allottee or heir so disposing of the same, and in 36 Stat. 857 (sec. 4) Congress directs that the proceeds from leases shall be paid to the allottee or his heirs, or expended for his or their benefit in the discretion of the Secretary of the Interior. Section 1 of the Act provides, in effect, that the proceeds from the sale of inherited lands shall be paid to competent heirs and held in trust during the trust period for incompetent Indians.

Similar provisions prevail with respect to per capita distributions which Congress has authorized to be made out of tribal funds. Competent Indians receive such payments without restrictions, whereas the shares of other Indians are held subject to expenditure under the rules and regulations of the Secretary of the Interior. (See 34 Stat. 1221.) From time to time Congress has indicated how the Secretary might invest certain of the funds of Indians thus committed to the supervision of the Department of the Interior. (See 40 Stat. 591, 41 Stat. 1249, 43 Stat. 1008.)

On the other hand, the 70th Congress, after extensive hearings failed to enact a measure expressly authorizing Indians (subject to certain limitations and conditions) to create trusts by agreements between the Indians and trust companies with the approval of the Secretary of the Interior.

From the foregoing it appears that while it has been the purpose of Congress to place the supervising control over Indian funds in the Secretary of the Interior, his control is not unlimited, but is based upon directions contained in the various statutes of Congress. I find no provision or implication in any statute to the effect that the Secretary of the Interior may delegate control of these Indian funds, while held under restrictions, to outside agencies.

I regard the control and supervision over Indian funds so committed to the Secretary of the Interior and the Department of the Interior as an imposition of a specific duty by Congress, and am of the opinion that it can not lawfully be transferred by the Secretary of the Interior to agencies outside of his Department. The suggested creation of a trust, in which the custody and control of the trust funds would be in a private trustee, would be an abdication on the part of the Secretary of the control of restricted Indian funds with which Congress has vested him.* I believe that this would be improper in the absence of specific congressional authority to that end, and I do not find that such authority has been given by Congress by existing statutes.

I have the honor to advise you, therefore, that your specific question must be answered in the negative.

The Secretary, however, has the power to remove restrictions from certain Indian funds. Upon the removal of such restriction from any fund and the release of the fund to the Indian, the Indian may use the fund as he sees fit, and if he desires to create a private trust of it by agreement with a trust company, I know of no legal objection to his doing so.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE INTERIOR.

COMPENSATION FOR INJURY TO VETERAN OF SPANISH-AMERICAN WAR RESULTING FROM HOSPITALIZATION

An honorably discharged veteran of the Spanish-American War, who was admitted to a Veterans' Bureau hospital and who in the course of his treatment sustained a fracture of the right femur, is entitled to the compensation provided by section 213 of the World War Veterans' Act, 1924, as amended.

Military service during the period of the World War is not essential in the case of one otherwise entitled to the compensation provided by section 213 of the World War Veterans' Act, 1924, as amended.

DEPARTMENT OF JUSTICE,

October 5, 1929.

SIR: I have the honor to refer to your letter of August 31, 1929, requesting my opinion upon the question hereinafter indicated.

It appears that Martin J. Tunney, an honorably discharged veteran of the Spanish-American War, was admitted to a Veterans' Bureau Hospital on April 10, 1928, and in the course of his treatment sustained a fracture of the right femur. In consequence thereof he is entitled to compensation from the United States unless the statute is to be construed as authorizing compensation under such circumstances only to veterans who have seen service in the World War.

The applicable statutory provisions are to be found in sections 202 (par. 10) and 213 of the World War Veterans' Act, 1924, as amended (June 7, 1924, c. 320, 43 Stat. 607, 620, 623; March 4, 1925, c. 553, 43 Stat. 1302, 1307, 1308; July 2, 1926, c. 723, 44 Stat. 790, 796; U. S. C. Title 38, secs. 484, 501).

Under section 202 (par. 10) the Director is authorized "to furnish hospitalization and necessary traveling expenses incident to hospitalization to veterans of any war, military occupation, or military expedition * * * without regard to the nature or origin of their disabilities."

Section 213 provides that, "where any beneficiary suffers or has suffered an injury," as the result of such hospitalization, "and such injury or aggravation of an existing injury results in additional disability to or the death of such beneficiary, the benefits of this title ["Title II—Compensation and Treatment"] shall be awarded in the same manner as

though such disability, aggravation, or death was the result of military service during the World War."

Veterans of the World War and veterans of the Spanish-American War are included alike in the phrase, "veterans of *any* war." Applying for and receiving the benefits thus extended to them (hospitalization), they become "beneficiaries," without distinction. Further benefits (compensation) are extended to "*any* beneficiary" who suffers an injury, etc., as the result of such hospitalization. "Beneficiary," thus used, is not defined, and there is nothing whatever to suggest that less is intended than would be indicated by the common meaning of the words employed.

It is my opinion, therefore, that military service during the period of the World War is not essential in the case of one otherwise entitled to the compensation provided by section 213 of the World War Veterans' Act, 1924, as amended.

Respectfully,

WILLIAM D. MITCHELL.

To the DIRECTOR, UNITED STATES VETERANS' BUREAU.

PHILIPPINE ISLANDS—LEGALITY OF BOND ISSUE

The proposed issue by the Government of the Philippine Islands of bonds in the sum of \$500,000, the proceeds from the sale of which are to be used for the construction of works and improvements in the Port of Iloilo, Province of Iloilo, being authorized by Congress and by Act No. 3417 of the Philippine Legislature of December 7, 1927, and being within the maximum of indebtedness authorized by law, and all statutory requirements regarding the issue of the bonds having been complied with, said bonds, which constitute the second series of bonds proposed to be issued under Philippine Act No. 3417, *supra*, when issued in the form and amount proposed, will have been legally issued and will be valid and binding obligations of the Government of the Philippine Islands.

DEPARTMENT OF JUSTICE,

October 12, 1929.

SIR: I have the honor to acknowledge receipt of your letter of September 17, 1929, requesting my opinion as to the validity of the proposed issue by the Government of the

Philippine Islands of bonds in the sum of \$500,000, being the second series and part of the total issue of bonds in the sum of \$2,175,000, authorized by Act No. 3417 enacted by the Seventh Philippine Legislature, Third Session, approved December 7, 1927, and the Act of Congress approved August 29, 1916 (c. 416, 39 Stat. 545), as amended by the Act of May 31, 1922 (c. 203, 42 Stat. 598), the proceeds from the sale of which are to be used for the construction of works and improvements in the Port of Iloilo, Province of Iloilo. The first series of these bonds, in the amount of \$750,000, dated April 1, 1928, was issued following the opinion of this Department dated April 17, 1928.

You state that you are now in receipt of a request from the Governor General of the Philippine Islands that said second series of bonds in the amount of \$500,000 be issued and sold as soon as possible, and that, pursuant to the said Act No. 3417, you have determined that said bonds shall be dated October 15, 1929, that they shall be in coupon form only in the denomination of \$1,000 each, that they shall bear interest at the rate of $4\frac{1}{2}$ per cent per annum, payable semiannually, and that they shall mature in thirty years (October 15, 1959) from the date of issue.

My predecessor, in an opinion dated April 17, 1928 (35 Op. 443), upheld the legality of the original authorization of the entire issue under Philippine Act No. 3417, *supra*, and approved the issuance of the first series of bonds covered by this authorization in the amount of \$750,000. In passing upon the legality of the proposed second series of bonds, in the sum of \$500,000, it is only necessary to consider whether the bonds when issued would increase the bonded indebtedness of the Government of the Philippine Islands beyond that permitted by law, and to pass upon the form of bond submitted.

Section 11 of the Act of August 29, 1916, *supra*, as amended by the act of May 31, 1922, *supra*, provides "that the entire indebtedness of the Philippine Government created by the authority conferred herein, exclusive of those obligations known as friar land bonds, shall not exceed at any one time 10 per centum of the aggregate tax valuation of its property * * *."

You inclose in your letter a memorandum by the Chief of the Bureau of Insular Affairs, in which it is stated:

"3. On December 31, 1928, the assessed valuation of taxable real property in the Philippine Islands was \$860,514,528.50. The present bonded indebtedness of the Philippine Government, exclusive of collateral bonds aggregating \$6,986,500, which are secured by an equivalent amount of bonds issued by its constituent Provinces and municipalities, and of \$5,117,000 friar lands purchase bonds now outstanding, is \$63,323,000. There is pending an additional issue of \$1,500,000 of bonds mentioned in memorandum from this Bureau dated July 19, 1929, approved by first indorsement from your office dated July 30, 1929. Against the payment of this indebtedness there had also been accumulated in the various sinking funds as of April 30, 1929, the latest date available, the sum of \$11,123,061.83, so that the indebtedness of the Philippine Government, together with the proposed increases therein, will not exceed the amount authorized by Congress."

From the foregoing statement it is apparent that the proposed second series of bonds in the sum of \$500,000, to be issued under Philippine Act No. 3417, *supra*, will not increase the bonded indebtedness of the Philippine Government beyond the maximum amount authorized by law.

I find that all of the statutory requirements regarding the issue of bonds by the Government of the Philippine Islands have been complied with in this case, and that the form of bond submitted by you is in substantial compliance with the law authorizing the issue. It is my opinion, therefore, that when issued in the form and amount proposed, said second series of bonds in the amount of \$500,000 will have been legally issued and will be valid and binding obligations of the Government of the Philippine Islands.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF WAR.

PHILIPPINE ISLANDS—LEGALITY OF BOND ISSUE

The proposed issue by the Government of the Philippine Islands of bonds in the sum of \$750,000, the proceeds from the sale of which are to be used for the extension of the port works and the improvement of the harbor facilities in the city and Province of Cebu, being authorized by Congress and by Act No. 3413 of the Philippine Legislature of December 7, 1927, and being within the limit of indebtedness authorized by law, and the statutory requirements regarding the issue of such bonds having been complied with, said bonds, which constitute the second series of bonds proposed to be issued under Philippine Act No. 3413, *supra*, when issued in the form and amount proposed, will have been legally issued and will be valid and binding obligations of the Government of the Philippine Islands.

DEPARTMENT OF JUSTICE,

October 12, 1929.

SIR: I have the honor to acknowledge receipt of your letter of September 17, 1929, requesting my opinion as to the validity of the proposed issue by the Government of the Philippine Islands of bonds in the sum of \$750,000, being the second series and part of the total issue of bonds in the sum of \$2,000,000, authorized by Act No. 3413 enacted by the Seventh Philippine Legislature, third session, approved December 7, 1927, and the Act of Congress approved August 29, 1916 (c. 416, 39 Stat. 545), as amended by the Act of May 31, 1922 (c. 203, 42 Stat. 598), the proceeds from the sale of which are to be used for the extension of the port works and the improvement of the harbor facilities in the city and Province of Cebu. The first series of these bonds, dated March 1, 1928, in the amount of \$750,000, was issued in accordance with the opinion of this office, dated April 17, 1928.

You state that you are now in receipt of a request from the Governor General of the Philippine Islands that said second series of bonds in the amount of \$750,000 be issued and sold as soon as possible, and that, pursuant to the said Act No. 3413, you have determined that said bonds shall be dated September 15, 1929, that they shall be in coupon form only in the denomination of \$1,000 each, that they shall bear interest at the rate of 4½ per cent per annum, payable semiannually, and that they shall mature in thirty years (September 15, 1959) from the date of issue.

My predecessor, in an opinion dated April 17, 1928 (35 Op. 446), upheld the legality of the original authorization of the entire issue under Philippine Act No. 3413, *supra*, and approved the issuance of the first series of bonds covered by this authorization in the amount of \$750,000. In passing upon the legality of the proposed second series of bonds, in the sum of \$750,000, it is only necessary to consider whether the bonds when issued would increase the bonded indebtedness of the Government of the Philippine Islands beyond that permitted by law, and to pass upon the form of bond submitted.

Section 11 of the Act of August 29, 1916, *supra*, as amended by the act of May 31, 1922, *supra*, provides "that the entire indebtedness of the Philippine Government created by the authority conferred herein, exclusive of those obligations known as friar land bonds, shall not exceed at any one time 10 per centum of the aggregate tax valuation of its property * * *."

You inclose in your letter a memorandum by the Chief of the Bureau of Insular Affairs, in which it is stated:

"3. On December 31, 1928, the assessed valuation of taxable real property in the Philippine Islands was \$860,514,528.50. The present bonded indebtedness of the Philippine Government, exclusive of collateral bonds aggregating \$6,986,500, which are secured by an equivalent amount of bonds issued by its constituent provinces and municipalities, and of \$5,117,000 friar lands purchase bonds now outstanding, is \$63,323,000. There is pending an additional issue of \$1,500,000 of bonds mentioned in memorandum from this Bureau dated July 19, 1929, approved by first indorsement from your office dated July 30, 1929. Against the payment of this indebtedness there had also been accumulated in the Philippine sinking funds as of April 30, 1929, the latest date available, the sum of \$11,123,061.83, so that the indebtedness of the Philippine Government, together with the issue pending, and this proposed increase, will not exceed the amount authorized by Congress."

From the foregoing statement it is apparent that the proposed second series of bonds in the sum of \$750,000, to be issued under Philippine Act No. 3413, *supra*, will not in-

crease the bonded indebtedness of the Philippine Government beyond the maximum amount authorized by law.

I find that all of the statutory requirements regarding the issue of bonds by the Government of the Philippine Islands have been complied with in this case, and that the form of bond submitted by you is in substantial compliance with the law authorizing the issue. It is my opinion, therefore, that when issued in the form and amount proposed, said second series of bonds in the amount of \$750,000 will have been legally issued and will be valid and binding obligations of the Government of the Philippine Islands.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF WAR.

PORTO RICO—LEGALITY OF BOND ISSUE

The proposed issue by the Government of Porto Rico of bonds in the sum of \$750,000.00, the proceeds from the sale of which are to be used in the payment of the principal of, and interest on, the bonds heretofore issued and sold for the construction of the Isabela Irrigation System, and for the operation and maintenance of said system until such time as the funds necessary for these purposes shall be produced from assessments levied upon lands included within the irrigation district, being authorized by Congress and the Legislature of Porto Rico, and all of the statutory requirements regarding the issue and sale of these bonds having been complied with, said bonds, when issued in the amount and form proposed, will have been legally issued and will constitute valid and binding obligations of the People of Porto Rico.

DEPARTMENT OF JUSTICE,

November 27, 1929.

SIR: I have the honor to acknowledge receipt of your letter of November 8, 1929, stating that your Department has been authorized to issue and sell for the account of the Government of Porto Rico bonds to the face value of \$750,000.00, the proceeds from which are to be used in the payment of the principal of, and interest on, the bonds heretofore issued and sold for the construction of the Isabela Irrigation System, and for the operation and maintenance of said system until such time as the funds necessary for these purposes

shall be produced from assessments levied upon lands included within the irrigation district.

The proposed bonds are to be issued under authority contained in section 3 of an Act of Congress approved March 2, 1917, entitled "An Act to provide a civil government for Porto Rico, and for other purposes" (c. 145, 39 Stat. 951, 953), as amended by Act approved March 4, 1927 (c. 503, 44 Stat. 1418), and in accordance with the authority contained in Joint Resolution No. 12 of the Legislature of Porto Rico, approved July 3, 1929, a copy of which was enclosed with your letter.

You state that said bonds are to be issued by you, at the request of the Treasurer of Porto Rico, in coupon form, in denominations of \$1,000 each, to be dated October 1, 1929, and to bear interest from January 1, 1930, at the rate of 4½ per cent per annum, payable semiannually on January 1 and July 1 of each year, said bonds to be payable at the Treasury of the United States in series on July 1, 1952 to 1970, inclusive. A copy of the form of the proposed bond is transmitted with your letter, and you request my opinion upon the legality of the proposed issue.

Section 3 of the Act of March 2, 1917, as amended, *supra*, provides:

" * * * and when necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Porto Rico or any municipal government therein as may be provided by law, and to protect the public credit: *Provided, however,* That no public indebtedness of Porto Rico and the municipalities of San Juan and Ponce shall be allowed in excess of 10 per centum of the aggregate tax valuation of its property * * *. In computing the indebtedness of the people of Porto Rico, municipal bonds for the payment of interest and principal of which the good faith of the people of Porto Rico has heretofore been pledged and bonds issued by the people of Porto Rico secured by bonds to an equivalent amount of bonds of municipal corporations or school boards of Porto Rico shall not be counted, but all bonds hereafter issued by any municipality or subdivision * * * for which the good faith of the people of Porto Rico is pledged shall be counted."

You state the records of your Department show that the aggregate assessed valuation of real and personal property in Porto Rico on June 30, 1929, amounted to \$344,865,104.00; that on said date there were outstanding bonds of the Government of Porto Rico of the face value of \$25,285,000.00, of which \$492,000.00 are secured by an equal amount of bonds of municipal corporations and school board bonds and, therefore, are not to be counted in ascertaining the amount of total bonded indebtedness the Government of Porto Rico is authorized to incur, and that the good faith of the People of Porto Rico has been pledged to the payment of principal and interest on Municipal bonds aggregating \$1,361,500.00 since the passage of the Act of Congress of March 4, 1927, making the outstanding bonded indebtedness of the Insular Government on June 30, 1929, which must be taken into consideration in connection with the issuing of further bonds, amount to \$26,154,500.00, against which there has been accumulated in the various sinking funds the sum of \$1,343,779.59. As the Government of Porto Rico is authorized to incur a maximum bonded indebtedness of 10 per cent of the assessed valuation of its property, it is apparent that the issue of the bonds now proposed will not increase such indebtedness beyond the amount permitted by law.

Section 3 of Joint Resolution No. 12, *supra*, provides:

"For the purpose of providing funds for the payment of principal of, and interest on, the bonds already issued and sold for the construction of the irrigation system, as well as for the operation and maintenance of said system until such time as the funds necessary for these purposes are produced by such assessments as may be levied on irrigated lands, as hereinbefore provided, and by the proceeds of other receipts, derived from said system, the Treasurer of Porto Rico is hereby authorized, empowered, and directed to issue bonds of The People of Porto Rico to the amount of one million, two hundred and fifty thousand (1,250,000) dollars, or such part thereof as may be necessary."

Said Resolution further provides that said bonds shall be issued in series, and may be in coupon or registered form in denominations of one thousand, five thousand, and/or ten thousand dollars, bearing interest at a rate not exceeding 5 per cent per annum, payable semiannually, redeemable in

series. It is further provided in said Resolution that the bonds may be sold by the Secretary of War or by the Treasurer of Porto Rico, with the approval of the Governor, upon such terms as may be most favorable to the people of Porto Rico, and that the Treasurer of Porto Rico, with the approval of the Governor, shall have absolute charge and authority under the limitations prescribed therein.

Said Joint Resolution also provides that the bonds issued thereunder "shall be exempt from taxation by the Government of the United States or by the Government of Porto Rico, or any political subdivision or municipality thereof, or by any State, county, municipality, or other municipal subdivision of any State or Territory of the United States, or by the District of Columbia," in accordance with the provisions of section 3 of the Act of Congress approved March 2, 1917, as amended; that the proceeds derived from the sale of the bonds shall be devoted to the payment of the principal of, and interest on, the bonds heretofore issued and sold for the construction of the irrigation system and for the operation and maintenance of said system; and that the good faith of the people of Porto Rico is pledged for the payment of the principal of and interest on said bonds.

There was transmitted with your letter a statement signed by the Treasurer of Porto Rico and approved by the Governor setting forth the conditions of the issue and sale of said bonds, and a certificate issued by the acting treasurer of Porto Rico regarding the outstanding bonded indebtedness of the Government of Porto Rico. It is apparent, therefore, that the issue of the bonds and the manner and form of their issue and payment have received the approval of the Governor of Porto Rico.

I find that all of the statutory requirements regarding the issue and sale of said bonds have been complied with and that the form of bond submitted is in substantial compliance with the law authorizing the same. It is my opinion, therefore, that when issued in the amount and form proposed said bonds will have been legally issued and will constitute valid and binding obligations of the People of Porto Rico.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF WAR.

**FEDERAL EMPLOYEES' COMPENSATION ACT—EMPLOYEES
OF THE INTERNATIONAL FISHERIES COMMISSION**

Employees of the International Fisheries Commission, created by the Convention of March 2, 1923, between the United States and Great Britain, are not "civil employees of the United States" within the meaning of the Federal Employees' Compensation Act of September 7, 1916 (39 Stat. 742, 750).

DEPARTMENT OF JUSTICE,
December 4, 1929.

SIR: I have the honor to comply with your request of October 30, 1929, for my opinion on the question whether employees of the International Fisheries Commission, created by the Convention of March 2, 1923 (43 Stat. 1841), between the United States and Great Britain, are "civil employees of the United States" within the meaning of the Act of September 7, 1916, c. 458, 39 Stat. 742, 750 (U. S. C. Title 5, secs. 751, 790), providing compensation for disability or death of employees resulting from personal injuries sustained while in the performance of their duties.

The Convention creating the Commission prohibits the nationals, inhabitants, and vessels of the United States and of the Dominion of Canada from fishing for halibut in the territorial waters and in the high seas off the western coasts of the United States and of the Dominion of Canada at certain times. It also provides for seizure of vessels and prosecutions for violations of the provisions of the Convention. Article III provides:

"The High Contracting Parties agree to appoint within two months after the exchange of ratifications of this Convention, a Commission to be known as the International Fisheries Commission, consisting of four members, two to be appointed by each party. This Commission shall continue to exist so long as this Convention shall remain in force. Each party shall pay the salaries and expenses of its own members, and joint expenses incurred by the Commission shall be paid by the two High Contracting Parties in equal moieties.

"The Commission shall make a thorough investigation into the life history of the Pacific halibut and such investi-

gation shall be undertaken as soon as practicable. The Commission shall report the results of its investigation to the two Governments and shall make recommendations as to the regulation of the halibut fishery of the North Pacific Ocean, including the Bering Sea, which may seem to be desirable for its preservation and development."

The Convention contains no reference to any employees. The "Director of Investigations," apparently selected by the Commission, has furnished the following information:

"Employees are appointed by the Commission as a unit acting through the chairman and the director of investigations. It is understood but not required that in so far as possible the employees of the Commission shall be in equal numbers Canadian and United States nationals if such are available for the particular duties required.

"The salary of all employees is determined on and approved by the International Fisheries Commission and is paid in total by the Department of Marine and Fisheries in Canada. The vouchers covering these payments are forwarded to the United States. Canada is thereupon reimbursed for the United States share as paid by Canada.

"Each country has made appropriations to cover these expenses which are joint in nature and so indicated by the terms of the treaty."

The Federal Employees' Compensation Act of September 7, 1916, was passed before the International Fisheries Commission was created, or provided for. I find nothing in the Compensation Act indicating that it was intended to apply to employees of such a commission. Their salaries are paid in the first instance by a department of the Dominion of Canada, and they are subject to the control of British commissioners to as great an extent as to the control of the commissioners appointed by the United States. In my opinion they are not "civil employees of the United States" within the meaning of the Act. My conclusion is fortified by the fact that section 24 provides that immediately after injury to an employee "his immediate superior shall make a report to the commission containing such information as the commission may require." The "immediate superior" in control of the employee who would be required to make the report required by section 24, if the Act is applicable,

would be the commission, half of the members of which are British. I do not believe that Congress intended to subject such a commission to this requirement.

It is my opinion, therefore, that the question asked should be answered in the negative.

Respectfully,

WILLIAM D. MITCHELL.

To the PRESIDENT.

AVAILABILITY OF UNCOLLECTED \$60 BONUS TO PREVENT
LAPSE OF WAR-RISK INSURANCE

A check for the sixty-dollar bonus provided by section 1406 of the Revenue Act of 1918 (40 Stat. 1151) was mailed to an honorably discharged veteran of the World War on April 21, 1919, and was received by him while he was on his deathbed and unable to collect or negotiate it. He died April 26, 1919, and thereafter the check was paid to his widow, upon her indorsement. *Held*, under such circumstances, that the mailing of the check and its receipt by the payee did not constitute payment; that the amount thereof was uncollected at the time of payee's death and was therefore available to prevent lapse of his war-risk insurance under section 309 of the World War Veterans' Act, 1924, as amended; and that this was unaffected by the subsequent payment of the bonus to the widow of the payee.

DEPARTMENT OF JUSTICE,
December 4, 1929.

SIR: I have the honor to refer to your letter of July 30, 1929, requesting my opinion upon the question hereinafter indicated.

A check for the sixty-dollar bonus provided by section 1406 of the Act of February 24, 1919, c. 18, 40 Stat. 1057, 1151, was mailed to Harry Ed. Luxenberger, an honorably discharged veteran of the World War, on April 21, 1919, and was received by him while he was on his deathbed and unable to negotiate it. He died April 26, 1919, and thereafter the check was paid to his widow, upon her indorsement. The question now arises whether it may be considered that the amount represented by this check remained uncollected at the time of the veteran's death and was therefore available to prevent lapse of his war risk insurance in accordance with the following section, which was added to

the World War Veterans' Act, 1924, by the Act of July 2, 1926, c. 723, 44 Stat. 790, 800 (U. S. C. Title 38, sec. 516b).

"SEC. 309. Where any person allowed his insurance to lapse and died after February 24, 1919, and prior to collecting the \$60 bonus provided by the Act of February 24, 1919 (Fortieth Statutes at Large, page 1151), then and in that event his insurance shall not be considered as lapsed during such period as said uncollected bonus would, if applied to the payment of premiums when due, equal or exceed the same, and the United States Veterans' Bureau is hereby authorized and directed to pay to his beneficiaries under said policy the amount of said insurance, less the premiums and interest thereon at 5 per centum per annum, compounded annually, in installments, as provided by law."

Section 1406 of the Act of February 24, 1919, specifically provided that, "this amount shall not be paid * * * to the heirs or legal representatives of any person entitled to any payment under this section who has died or may die before receiving such payment."

Ruling upon what constitutes payment, within the meaning of the latter section, the Auditor for the War Department on May 12, 1919, declared: "It appears that the actual issuance of a negotiable instrument and its deposit in the mail does not enter into the question but that in order to constitute payment it is necessary that the instrument be received by the payee." His decision (not reported) was approved by the Comptroller of the Treasury, May 30, 1919, without discussion.

The Auditor did not expressly say that mere receipt of a check by the payee would constitute payment. His words, however, were so interpreted, and the rule supposed to have been announced by him was followed in a number of similar cases. The instant case was one of them.

Upon recommendation of the Zone Finance Officer, concurred in by the Auditor for the War Department, the check which had been mailed to Mr. Luxenberger was noted, over the signature of the Chief of Division of Public Moneys—"This check may be paid in the usual manner on the indorsement of Mrs. H. E. Luxenberger, widow of the payee." The check, so indorsed, was paid July 14, 1919.

Later the precise question was considered by the Comptroller of the Treasury in another case, and, on June 15, 1920 (26 Comp. Dec. 1038, 1039), he advised the Secretary of the Navy as follows:

"In connection with allotments of Army pay this office has held that an amount represented by a check issued in payment of such allotment to an allottee who died before collecting or negotiating the check does not become part of the allottee's estate, without regard to whether the check had been received by the allottee, or had been indorsed by the allottee, or not. 26 Comp. Dec., 855.

The same principle applies to checks issued in payment of the bonus referred to in your letter. Accordingly the amount of this bonus does not become assets of decedent's estate to be disposed of by the administrator."

It appears that the rule thus stated by the Comptroller of the Treasury has since been followed, and the conclusion is in harmony with that of Attorney General Garland, that "the sending of a check to a pensioner, which has been indorsed by him but not transferred in his lifetime, is not a payment 'so completed that the amount due by way of pension becomes assets'" in the estate of the decedent. 19 Op. 1, 5.

It is my opinion that the mailing of the check and its receipt by the payee, under the circumstances hereinbefore set forth, did not constitute payment; that the amount thereof was uncollected at the time of the payee's death and therefore available to prevent lapse of his insurance under section 309, World War Veterans' Act 1924, as amended; and that this was unaffected by the subsequent payment of the bonus to the widow of the payee.

Respectfully,

WILLIAM D. MITCHELL.

TO DIRECTOR, UNITED STATES VETERANS' BUREAU.

**BRANCHES FOR STATE BANKS CONVERTED INTO, AND
CONSOLIDATED WITH, NATIONAL BANKS**

Where a State bank, operating in a city of slightly under one hundred thousand population and having three branches, two of which were established prior to the passage of the Act of February 25, 1927 (44 Stat. 1224), is converted into a national bank, the converted bank may retain only the two branches established by the State bank prior to February 25, 1927, and may, with the consent and approval of the Comptroller of the Currency, establish two new branches within the limits of the city of its location, provided the law of the State permits the establishment of branches by State banks.

Where a State bank, operating in a city having a population of slightly less than one hundred thousand and having two branches in lawful operation prior to the approval of the Act of February 25, 1927, *supra*, is consolidated with a national bank having two branches authorized by the Comptroller of the Currency pursuant to the provisions of the said Act of February 25, 1927, the consolidated bank may retain only the two branches established by the State prior to February 25, 1927, and, after the consolidation, it may, with the consent and approval of the Comptroller of the Currency, establish not more than two additional branches within the limits of the city where said bank is located, provided the law of the State permits the establishment of branches by State banks.

DEPARTMENT OF JUSTICE,
December 23, 1929.

SIR: I have the honor to reply to your letter of August 6, 1929, wherein you state that the Comptroller of the Currency has before him the application of a State bank, operating in a town of slightly under one hundred thousand population, to convert into a national bank, and that said State bank is now operating three branches, one of which was established subsequent to the passage of the Act of February 25, 1927, known as the "McFadden Act." You request to be advised (a) whether the branch established subsequent to February 25, 1927, must be discontinued upon conversion of the State bank into a national bank; and (b) whether the Comptroller of the Currency is authorized, after conversion of the State bank, to grant two new branches to the national bank established by such conversion, such new branches being in addition to those retained upon conversion.

Section 7 of the Act of February 25, 1927, c. 191, 44 Stat. 1228, amends section 5155 of the Revised Statutes (Title 12, sec. 36 U. S. C.) to read in part as follows:

“(b) If a State bank is hereafter converted into or consolidated with a national banking association, or if two or more national banking associations are consolidated, such converted or consolidated associations may, with respect to any of such banks, retain and operate any of their branches which may have been in lawful operation by any bank at the date of the approval of the Act.

“(c) A national banking association may, after the date of the approval of this Act, establish and operate new branches within the limits of the city, town, or village in which said association is situated if such establishment and operation are at the time permitted to State banks by the law of the State in question.

“(d) No branch shall be established after the date of the approval of this Act within the limits of any city, town or village of which the population by the last decennial census was less than twenty-five thousand. No more than one such branch may be thus established where the population, so determined, of such municipal unit does not exceed fifty thousand; and not more than two such branches where the population does not exceed one hundred thousand. In any such municipal unit where the population exceeds one hundred thousand the determination of the number of branches shall be within the discretion of the Comptroller of the Currency.

“(e) No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.”

Paragraph (b) provides in effect that upon the conversion of a State bank into a national banking association, the banking association resulting from the conversion may retain any branches which the converted bank may have had in lawful operation on February 25, 1927. This provision is permissive in character, and the inference is plain that any branch or branches established or acquired subsequent to February 25, 1927, by the converting bank must be relinquished upon conversion.

After conversion into a national banking association the converted bank comes within the provisions of paragraphs (c), (d), and (e) of section 7 of said Act. Paragraph (c) permits national banking associations to establish branches, subsequent to February 25, 1927, within the limits of the city or town in which the parent bank is located, if the State laws permit the establishment of such branches by State banks, subject, however, to the conditions contained in paragraphs (d) and (e). Such conditions are that no national banking association shall establish more than two such branches where the population of the city or town in which the bank is located exceeds fifty thousand and does not exceed one hundred thousand; and that the establishment of the branch or branches is with the consent and approval of the Comptroller of the Currency.

It follows, therefore, that when a State bank, converting into a national banking association, has received its charter as a national banking association (it being located within a city the population of which is more than fifty thousand and less than one hundred thousand) it may apply for and with the consent and approval of the Comptroller of the Currency establish not more than two branches within the limits of the city where said bank is located, provided that the law of the State permits the establishment of such branches by State banks.

The branches it may be authorized to establish under paragraphs (c) and (d) are in addition to those retained under paragraph (b). In the case you submit, the two branches established by the State bank prior to February 25, 1927, and which it has the right to retain on the conversion into a national banking association, are located in the city where the main bank is situated. The result of this construction of the statute is that this converted bank may add two new branches, making four in all in the city, although a new national bank could establish and maintain only two. Such an inequality is produced, not by the mere conversion, but by action after conversion, and there may be doubt as to whether the Congress intended such a result, but the terms of the statute seem to justify this construction. However, Congress must have had in mind the safeguard contained in

paragraph (e), which requires the consent and approval of the Comptroller of the Currency to the establishment of new branches.

Congress has used the word "established" in paragraph (d) and has refrained from using the word "maintain." If it intended that old branches retained upon conversion should be counted in determining the number of new branches to be allowed under paragraph (d), appropriate words should have been added to paragraph (d). Furthermore, branches in other cities previously established and retained upon conversion could not be counted to reduce the number of new branches in the city in which the parent bank is located, allowed under paragraph (d), without placing a converted bank at a disadvantage in respect of the number of branches allowed in the city of its location. It is apparent that to derive from the statute an implication that the number of branches retained on conversion shall restrict the number of new ones allowed under paragraph (b) would not remove inequalities in powers between converted banks and new national banking associations. The resulting conclusion is that the statute should be taken literally.

In the case submitted it may be that the Comptroller of the Currency would approve an application by the national bank resulting from the conversion to establish as one of the new branches permitted by paragraph (c) the very branch which the State bank would be required to relinquish upon conversion. If such be the case, I see no objection to the Comptroller of the Currency so indicating in advance, in order that an application to that end might be made by the resulting national bank, and approved, substantially simultaneously with the conversion. If this were done the temporary cessation of business at the branch attendant upon its formal relinquishment would not result in any practical inconvenience.

In the second case submitted you state that there is now pending before the Comptroller of the Currency the application of a State bank, having two branches in lawful operation prior to February 25, 1927, to consolidate with a national banking association, having two branches authorized by the Comptroller of the Currency under the provi-

sions of paragraph (c) of section 7 of said Act. You state that both of the banks are located in a city the population of which is slightly less than one hundred thousand, and that their application for consolidation provides for the retention of all four branches by the consolidated bank. You request to be advised whether the Comptroller of the Currency is authorized to approve the retention of the four branches by the consolidated bank.

Section 1 of the Act of February 25, 1927, *supra*, amended the Act of November 7, 1918, by adding thereto a new section (section 3) which provides for the consolidation of State banks with national banking associations as follows:

"SEC. 3. That any bank incorporated under the laws of any State, or any bank incorporated in the District of Columbia, may be consolidated with a national banking association located in the same county, city, town, or village under the charter of such national banking association on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association or bank proposing to consolidate, * * *

Paragraph (b) of section 7 of the Act of February 25, 1927, *supra*, provides that if a State bank, having branches established prior to February 25, 1927, is consolidated with a national banking association the consolidated association may retain such branches. Paragraph (c) of said Act provides that a national banking association may, after February 25, 1927, establish branches within the limits of a city or town in which said association is located. This permission is subject to the conditions provided in paragraphs (d) and (e).

It appears from the statement of facts that the national banking association with which the State bank proposes to consolidate has availed itself of the foregoing provision and, with the approval of the Comptroller of the Currency, has established two branches as provided by the statute. As the State bank upon consolidation with the national banking association will cease to exist, its branches, established prior to February 25, 1927, will become the branches of the consolidated bank.

The provisions and implied limitation contained in paragraph (b) of section 7 of the Act apply to the consolidation of a State bank with a national banking association to the

same extent and with equal force as they apply to the conversion of a State bank into a national banking association; namely, that "any of their branches which may have been in lawful operation by any bank at the date of the approval of the Act" may be retained by the consolidated bank, and any branches established by either of the consolidating banks subsequent to the date of the approval of the Act must be relinquished, notwithstanding the branches of the national banking association were established pursuant to the authority contained in paragraph (c), and with the consent and approval of the Comptroller of the Currency. This is the plain import of the language of the statute, and there is nothing contained in the Act which justifies a departure from its exact terms.

When the proposed consolidation has been consummated, the consolidated bank may apply for and, with the consent and approval of the Comptroller of the Currency, establish not more than two branches within the limits of the city where said bank is located, provided the law of the State permits the establishment of branches by State banks.

As the national bank involved in the consolidation preserves its corporate identity and existence, I see no objection to its filing an application for leave to establish two new branches simultaneously with the filing of application for approval of the consolidation, so that if the Comptroller approves, there may be avoided the useless formality of first relinquishing and then immediately reestablishing the branches which were subject to relinquishment under paragraph (b).

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE TREASURY.

BOULDER CANYON PROJECT ACT

Under the provisions of the Boulder Canyon Project Act (45 Stat. 1057) advances from the General Treasury to the Colorado River Dam fund for construction costs of the All-American Canal are not interest bearing.

The Secretary of the Interior is not required, in fixing the sale rates for power to be generated at Boulder Dam, to make pro-

vision for the amortization within the fifty years of the \$25,000,000 allocated by the Boulder Canyon Project Act to flood control. The Boulder Canyon Project Act does not require the Secretary of the Interior to make provision for the payment out of the power proceeds, during the fifty-year period of amortization, of interest on the \$25,000,000 allocated by said Act to flood control.

DEPARTMENT OF JUSTICE,

December 26, 1929.

SIR: I have the honor to comply with the requests contained in your letters of August 3 and August 8, 1929, for my opinion upon certain questions arising under the Boulder Canyon Project Act, 45 Stat. 1057, which you state as follows:

"1. Whether or not advances from the General Treasury to the Colorado River Dam Fund for construction costs of the All-American Canal, and disbursements from the Colorado River Dam Fund for that purpose, should be interest-bearing?

"2. In fixing the sale rates for power to be generated at Boulder Dam, must provision be made for amortization within 50 years of the \$25,000,000 allocated by the act to flood control?

"3. Must provision be made for payment out of power proceeds, during the 50-year period of amortization, of interest upon the principal of the \$25,000,000 allocated to flood control? If so, should interest start to run from the first appropriation made from the General Treasury to the Colorado River Dam Fund?"

The provisions of the Boulder Canyon Project Act which are especially relevant to these questions are the following:

"*Be it enacted* * * *, That for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior, subject to the terms of the Colorado River compact hereinafter mentioned, is hereby authorized to construct, operate, and maintain a dam and incidental works

in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary of the Interior is hereby authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California, the expenditures for said main canal and appurtenant structures to be reimbursable, as provided in the reclamation law, and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy at the dam authorized to be constructed at said Black Canyon or Boulder Canyon, or for water for potable purposes outside of the Imperial and Coachella Valleys: *Provided, however,* That no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys; also to construct and equip, operate, and maintain at or near said dam, or cause to be constructed, a complete plant and incidental structures suitable for the fullest economic development of electrical energy from the water discharged from said reservoir; * * *

“SEC. 2. (a) There is hereby established a special fund, to be known as the ‘Colorado River Dam fund’ (hereinafter referred to as the ‘fund’), and to be available, as hereafter provided, only for carrying out the provisions of this Act. All revenues received in carrying out the provisions of this Act shall be paid into and expenditures shall be made out of the fund, under the direction of the Secretary of the Interior.

“(b) The Secretary of the Treasury is authorized to advance to the fund, from time to time and within the appropriations therefor, such amounts as the Secretary of the Interior deems necessary for carrying out the provisions of this Act, except that the aggregate amount of such advances shall not exceed the sum of \$165,000,000. Of this amount the sum of \$25,000,000 shall be allocated to flood control and shall be repaid to the United States out of 62½

per centum of revenues, if any, in excess of the amount necessary to meet periodical payments during the period of amortization, as provided in section 4 of this Act. If said sum of \$25,000,000 is not repaid in full during the period of amortization, then 62½ per centum of all net revenues shall be applied to payment of the remainder. Interest at the rate of 4 per centum per annum accruing during the year upon the amounts so advanced and remaining unpaid shall be paid annually out of the fund, except as herein otherwise provided.

“(c) Moneys in the fund advanced under subdivision (b) shall be available only for expenditures for construction and the payment of interest, during construction, upon the amounts so advanced. No expenditures out of the fund shall be made for operation and maintenance except from appropriations therefor.

“(d) The Secretary of the Treasury shall charge the fund as of June 30 in each year with such amount as may be necessary for the payment of interest on advances made under subdivision (b) at the rate of 4 per centum per annum accrued during the year upon the amounts so advanced and remaining unpaid, except that if the fund is insufficient to meet the payment of interest the Secretary of the Treasury may, in his discretion, defer any part of such payment, and the amount so deferred shall bear interest at the rate of 4 per centum per annum until paid.

“(e) The Secretary of the Interior shall certify to the Secretary of the Treasury, at the close of each fiscal year, the amount of money in the fund in excess of the amount necessary for construction, operation, and maintenance, and payment of interest. Upon receipt of each such certificate the Secretary of the Treasury is authorized and directed to charge the fund with the amount so certified as repayment of the advances made under subdivision (b), which amount shall be covered into the Treasury to the credit of miscellaneous receipts.

* * * * *

“SEC. 4. (b) Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior

shall make provision for revenues by contract, in accordance with the provisions of this Act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this Act.

"Before any money is appropriated for the construction of said main canal and appurtenant structures to connect the Laguna Dam with the Imperial and Coachella Valleys in California, or any construction work is done upon said canal or contracted for, the Secretary of the Interior shall make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law.

"If during the period of amortization the Secretary of the Interior shall receive revenues in excess of the amount necessary to meet the periodical payments to the United States as provided in the contract, or contracts, executed under this Act, then, immediately after the settlement of such periodical payments, he shall pay to the State of Arizona $18\frac{3}{4}$ per centum of such excess revenues and to the State of Nevada $18\frac{3}{4}$ per centum of such excess revenues.

"SEC. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. * * *

"After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colorado River Basin as may hereafter be prescribed by the Congress.

* * * * *

"SEC. 7. That the Secretary of the Interior may, in his discretion, when repayments to the United States of all money advanced, with interest, reimbursable hereunder, shall have been made, transfer the title to said canal and appurtenant structures, except the Laguna Dam and the main canal and appurtenant structures down to and including Syphon Drop, to the districts or other agencies of the United States having a beneficial interest therein in proportion to their respective capital investments under such form of organization as may be acceptable to him. * * *

"SEC. 9. That all lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry. Thereafter, at the direction of the Secretary of the Interior, such lands shall be opened for entry, in tracts varying in size but not exceeding one hundred and sixty acres, as may be determined by the Secretary of the Interior, in accordance with the provisions of the reclamation law, and any such entryman shall pay an equitable share in accordance with the benefits received, as determined by the said Secretary, of the construction cost of said canal and appurtenant structures; said payments to be made in such installments and at such times as may be specified by the Secretary of the Interior, in accordance with the provisions of the said reclamation law, and shall constitute revenue from said project and be covered into the fund herein provided for: * * *

"SEC. 12. * * *

"'Reclamation law' as used in this Act shall be understood to mean that certain Act of the Congress of the United States approved June 17, 1902, entitled 'An Act appropriating the receipts from the sale and disposal of public land in certain States and Territories to the construction of irrigation works for the reclamation of arid lands,' and the Acts amendatory thereof and supplemental thereto. * * *

"SEC. 14. This act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided."

* * * * *

I

Your first question is as follows:

"Whether or not advances from the General Treasury to the Colorado River Dam Fund for construction costs of the All-American Canal, and disbursements from the Colorado River Dam Fund for that purpose, should be interest-bearing."

The All-American Canal is one of the works which the Secretary of the Interior is authorized to construct under section 1 of the Act, being therein described as "a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam [near the Mexican boundary], * * * with the Imperial and Coachella Valleys in California." The other physical constructions thereby authorized are "a dam and incidental works at Black Canyon or Boulder Canyon" and a power plant at or near that dam. Section 1 recites the purposes of these constructions as controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses, and for the generation of electrical energy as a means of making the project a self-supporting and financially solvent undertaking.

The "Colorado River Dam Fund," to which your question relates, is established by section 2 (a) of the Act as a special fund to be available only for carrying out the provisions of the Act. It is further provided that "revenues received in carrying out the provisions of this Act shall be paid into and expenditures shall be made out of the fund, under the direction of the Secretary of the Interior." It is thus apparent that a single fund is provided into which and

out of which all receipts and disbursements connected with any phase of the project must flow, regardless of source. By section 2 (b) the Secretary of the Treasury is authorized to advance to the fund, from time to time and within the appropriations therefor, such amounts not exceeding \$165,000,000, as the Secretary of the Interior deems necessary.

Section 2 (b) further provides:

“Interest at the rate of 4 per centum per annum accruing during the year upon the amounts so advanced and remaining unpaid shall be paid annually out of the fund, except as herein otherwise provided.”

The question is, therefore, whether the Act should be construed as providing that interest is not to be paid on moneys advanced to the fund for the cost of construction of the All-American Canal.

The Act nowhere so provides in express terms, and there are provisions in section 2 relating to the fund which, taken literally, would require that all moneys advanced by the Treasury for any part of the authorized project should bear interest. By section 2 (d) the Secretary of the Treasury is directed to charge the fund as of June 30 in each year “with such amount as may be necessary for the payment of interest on advances made under subdivision (b) at the rate of 4 per centum per annum accrued during the year upon the amounts so advanced and remaining unpaid, except that if the fund is insufficient to meet the payment of interest the Secretary of the Treasury may, in his discretion, defer any part of such payment, and the amount so deferred shall bear interest at the rate of 4 per centum per annum until paid.” It may be suggested that the phrase “except as herein otherwise provided” in section 2 (b) should be deemed to refer only to the exception with respect to the deferment of interest provided in section 2 (d), just quoted. The references in section 2 (c) to “the payment of interest, during construction, upon the amounts so advanced,” and in section 2 (e) to “payment of interest,” are not expressly qualified. An inference that all sums advanced from the Treasury for any part of the project are to be interest-bearing may also be drawn from the reference in section 5 to “the repay-

ments to the United States of all money advanced with interest" and the provision of section 7 that the Secretary of the Interior may, in his discretion, "when repayments to the United States of all money advanced, with interest, reimbursable hereunder, shall have been made, transfer the title" to the said canal and appurtenant structures, with certain exceptions, to the districts or other agencies of the United States having a beneficial interest therein.

On the other hand, there are other provisions of the Act which provide an entirely different plan of reimbursement of expenditures for the canal and appurtenant structures than those which govern the reimbursement of the cost of the dam and power project. Section 1 provides that "the expenditures for said main canal and appurtenant structures [are] to be reimbursable, as provided in the reclamation law, and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy at the dam authorized to be constructed at said Black Canyon or Boulder Canyon, or for water for potable purposes outside of the Imperial and Coachella Valleys." No such provision is made with respect to the dam or power plant, and it is manifest from the Act as a whole that the expenditures for their construction are to be paid mainly, if not wholly, from those revenues which were excluded as a source of reimbursement of expenditures for the canal. In section 4 (b), which requires the Secretary of the Interior to make certain provisions for revenues before any money is appropriated for the construction of the works comprised in the project or any construction work is done thereon, the dam and power plant and the main canal and appurtenant structures are treated in separate paragraphs, which differ materially in their provisions. The first paragraph, dealing with the dam and power plant, requires that the Secretary make provision for revenues, adequate in his judgment to insure, among other things, "the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this Act;" whereas in the second paragraph, dealing with the main canal and appurtenant structures, the requirement is that

he shall make provision for revenues adequate in his judgment "to insure payment of all expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law"; and interest is not mentioned.

Thus, while the dam and reservoir were to provide for the storage of waters for the purpose of reclamation of public lands as well as for flood control, improvement of navigation, generation of electrical energy, and the other purposes recited in section 1, the main canal was singled out and treated as a purely reclamation project, the expenditures for which were to be reimbursable in the same manner as those for other projects administered under the reclamation law.

The reclamation law is defined by section 12 as meaning the Act of June 17, 1902 (c. 1093, 32 Stat. 388), and the Acts amendatory thereof and supplemental thereto. The plan set forth in those Acts, so far as here material, is as follows: By section 1 of the Act of June 17, 1902, a special fund was created in the Treasury known as the "reclamation fund," consisting of moneys received from the disposal of public lands in certain States and certain fees and commissions; other sources of revenue were added by supplemental Acts. The moneys in this fund are used for the construction of irrigation projects which the Secretary of the Interior determines to be practicable, and the fund is then reimbursed by charges made upon the lands designated by the Secretary by public notice as irrigable under the project, whether held by entrymen or in private ownership. Those charges are to be determined "with a view of returning to the reclamation fund the estimated cost of construction of the project," and are to be apportioned equitably (*id.*, secs. 2, 3, 4, and 5; see also Act of August 13, 1914, 38 Stat. 690; Act of December 5, 1924, sec. 4, 43 Stat. 702). By the Act of May 25, 1926, section 46 (44 Stat. 649), no water is to be delivered upon the completion of the project until contracts approved by the Secretary shall have been made with irrigation districts providing for the payment, among other things, "of the cost of constructing" the works in not more than forty years from the date of the public notice. The reclamation fund is thus a permanent revolving fund,

created in the first instance by an appropriation of public moneys and used for the financing of reclamation projects.

This fund is not to be used for the works authorized by the Boulder Canyon Project Act, which are financed instead through the Colorado River dam fund created by section 2, and that Act contemplates (see secs. 5 and 9) that revenues received under the reclamation law in connection with this project are to be covered into that fund. The provisions of section 9, however, closely parallel those of the reclamation law, and the references in sections 1 and 4 (b) to the reimbursement of the cost of construction of the main canal and appurtenant structures in the manner provided by the reclamation law manifestly refer to the charging of the cost of construction upon the lands benefited as therein described.

The reclamation law contains no provision for the payment by the land owners of any interest upon the sums advanced from the reclamation fund, and I am advised that the term "construction charge" as used in the reclamation law has never been construed by the Interior Department as including an interest charge upon the cost of construction. Congress must be deemed to have been familiar with the reclamation law, to which frequent references are made in the Act, and with the practical interpretation thereof by the Interior Department as not authorizing the charging of interest upon the cost of construction of a reclamation project against the lands benefited thereby. In this view, the omission of any mention of interest in the second paragraph of section 4 (b), in contradistinction to the express mention thereof in the first paragraph, is significant, and strongly indicative of an intention of Congress that interest upon the construction cost of the All-American Canal should not be charged against lands benefited.

If interest is not to be charged against the land, the Act designates no source of revenue from which interest might be paid to the General Treasury upon sums advanced for the construction costs of the canal. Section 1 explicitly provides that the expenditures for the canal shall not be paid out of revenues from the sale or disposal of water power or electric energy at the dam or for water for potable purposes outside of the Imperial and Coachella Valleys. It is reasonable to presume that, since Congress forbade the use

of such revenues for payment of the principal of such expenditures, it did not intend that they should be reached to pay interest thereon. It appears that the cost of the canal and appurtenant structures is expected to be nearly \$40,000,000. Under the reclamation law repayment may not be accomplished for forty years. Interest at four per cent upon that sum for that period would constitute an amount of such magnitude that the failure of Congress to specify any revenues out of which it could probably be paid creates a strong inference that it was not intended to be paid.

The apparent conflict between the provisions of the Act above discussed is, in large part, explained by its legislative history, which, in my judgment, makes it clear that it was the intention of Congress that advances for the cost of construction of the All-American Canal should not bear interest.

The bills originally introduced by Senator Johnson in the Senate (S. 728, 70th Cong., 1st sess.) and by Congressman Swing in the House (H. R. 5773, 70th Cong., 1st sess.) did not differentiate the manner in which the expenditures for the canal were to be reimbursed from that which was to govern the repayment of the expenditures for the dam and power plant, and it was plain that interest was to be paid upon all sums advanced from the Treasury for the construction of any of the works thereby authorized. Section 1 did not contain the words:

“the expenditures for said main canal and appurtenant structures to be reimbursable, as provided in the reclamation law, and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy at the dam authorized to be constructed at said Black Canyon or Boulder Canyon, or for water for potable purposes outside of the Imperial and Coachella Valleys.”

The last sentence of section 2 (b), requiring the payment of interest upon advances, was not qualified by the words “except as herein otherwise provided.” Section 4 (b) contained but one paragraph, reading as follows:

“(b) Before any money is appropriated or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues, by contract or

otherwise, in accordance with the provisions of this Act, adequate, in his judgment, to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of the project, of all amounts advanced to the fund under subdivision (b) of Section 2, together with interest thereon."

Section 7 did not contain the words "reimbursable hereunder" following the word "interest." Sections 5, 9, and 14 (originally numbered 13) were, so far as here material, substantially in their present form. It was thus anticipated that revenues would be received by the fund under the reclamation law. But those revenues and the revenues from power and other sources were to be used indiscriminately for the repayment of advances to the fund and interest thereon.

The report of the Senate Committee on Irrigation and Reclamation (Rept. No. 592, 70th Cong., 1st sess., March 20, 1928), however, recommended several amendments, of which the following are here significant: To insert in section 1 part of the language above quoted, namely, "the expenditures for said main canal and appurtenant structures to be reimbursable, as provided in the reclamation law," the committee explaining the purpose of this amendment as "avoiding conflict with well-established precedent" (Rept. p. 4); to add to the last sentence of section 2 (b) the words "except as herein otherwise provided"; to add to section 4 (b) the words "made reimbursable under this Act"; and in section 7 to insert, after the words "with interest," the words "reimbursable hereunder."

The Senate bill, with these proposed amendments, was thereafter extensively debated in that body, but no action was taken thereon before adjournment *sine die* on May 29, 1928 (Cong. Rec., vol. 69, p. 10678). Meanwhile, the House had passed its bill, unamended in any respect here material, on May 25, 1928 (*id.*, p. 9990). After the commencement of the second session of the Seventieth Congress in December, 1928, the Senate substituted the House bill for the Senate bill, Senator Johnson offering an amendment striking out all after the enacting clause and substituting therefor the Senate bill with the proposed amendments (Cong. Rec., vol.

70, p. 68). The subsequent debates hereinafter referred to were in the Senate on the House bill as thus amended.

The committee amendments above discussed, which segregated the canal project and made the land benefited bear the cost of its construction were apparently proposed for the purpose of meeting opposition to the use of revenues from power for any payment on account of the canal, which was regarded as a reclamation project for the benefit of the Imperial and Coachella Valleys in California. (See minority views, Sen. Rept. 592, pt. 2, pp. 25-26; see also Cong. Rec., vol. 69, pp. 9457-9459, 10295, 10495; vol. 70, pp. 230-231, 236, 244.)

The committee report contains language indicating that it regarded the effect of the amendment as also making expenditures for the reclamation features noninterest bearing. The statement is made (Rept., p. 7) that "this tremendous enterprise * * * will cost the Federal Government nothing except loss of interest on reclamation features, the same as in all other works of this kind." The report further states (pp. 7-8):

"While the Government will in the first instance advance funds for the construction of the works, all advancements will be repaid to the Government within 50 years and those for purposes other than reclamation, with interest at 4 per cent per annum."

The report is not wholly clear on this subject because it goes on (p. 8) to refer to the authorized appropriation as including an item for interest during construction of the then estimated cost of the works including the canal. It is to be observed that the items embraced in the appropriation were made up before the committee amendments segregating the canal were proposed (*id.*, p. 27), and it is probable that the committee overlooked the fact that its discussion of the interest item was not consistent with its earlier language regarding loss of interest on reclamation features. The report, moreover, refers to the interest item as "largely a bookkeeping arrangement to fix the amount for which beneficiaries of the project will be charged." In the subsequent debates, Senator Johnson, who was in charge of the bill, in a colloquy with Senator King on May 1 (Cong. Rec., vol. 69, p. 7623), made the direct statement that the pay-

ments by the land owners, the beneficiaries of the canal, were to be without interest. The colloquy is as follows:

"Mr. KING. I think the Senator ought to state that with respect to the All-American canal it is not contemplated that interest shall be charged upon any advancement, even if the people in the valley are ever able to pay it; in other words, that the interest is to be remitted, and that they are to have an indefinite period—40 years at least—within which to make payment.

"Mr. JOHNSON. No; they are to repay under the reclamation law.

"Mr. KING. That means without interest.

"Mr. JOHNSON. Exactly."

(See, also, *id.*, pp. 7389-7390; 7627, 9457.)

While there are other statements in the debates during April and May from which it might be implied that it was not clearly understood that interest was not to be payable upon advances for the construction cost of the canal (*id.*, pp. 7389, 7536, 7538), this was definitely recognized in the debates in December which immediately preceded the passage of the bill. During the discussion on December 11 Senator Johnson referred to the report of the Board of Engineers appointed by the Secretary of the Interior, with the approval of the President, under authority of Joint Resolution approved May 29, 1928 (Document No. 446, H. R., 70th Cong., 2d sess.), and the following colloquy then occurred between him and Senator King (Cong. Rec., vol. 70, p. 402):

"Mr. KING. It is important in the discussion of the question of amortization. The Senator stated that under the plan suggested by the commission the all-American canal would be constructed under the reclamation project and therefore nothing would be a charge under the terms of the bill. The Senator forgot for the moment, I think, that the interest would have to be borne by the Government for the advances which were made for the construction of the all-American canal.

"Mr. JOHNSON. The Senator is right, but it would be only the interest which would have to be borne.

"Mr. KING. But it would be several million dollars."

On December 13 Senator King pointed out the difference between the reclamation fund, which under the reclamation law was a revolving fund produced from the sale of public lands, oil royalties, and so forth, and the Colorado River dam fund, which was created by direct advances from the Treasury. He said (*id.*, p. 519) :

"It is true that the Secretary of the Interior is required to make contracts with those whose lands are to be irrigated from the canal for the repayment to the Government of the cost of the canal, covering a period of 40 years, but without interest. It seems, therefore, that the Government derives no interest whatever from the \$38,500,000, or the \$11,000,000 should the canal to the Coachella Valley be constructed."

The following colloquy then took place between Senator King and Senator Phipps, who was chairman of the committee on Irrigation and Reclamation (*id.*, p. 521) :

"Mr. KING. Is not the Senator in error in stating that the Government receives interest upon the entire amount of \$140,000,000 [being the \$165,000,000 provided in the bill, less \$25,000,000 allocated thereby to flood control]? According to the amendment of the Senator, \$25,000,000 is deducted for the moment. Then the Government makes the advancement for the construction of the all-American canal, and that is not to draw interest. That is to say, we are to pay it out of the fund, but the Government does not get back interest for the amount which is utilized in the construction of the canal.

"Mr. PHIPPS. No; that would come under the Reclamation Act under the provisions of this bill.

"Mr. KING. The Senator knows that while we label it as coming under the Reclamation Act, as a matter of fact the amount needed for the construction of the all-American canal does not come from the reclamation fund, but comes from this \$165,000,000, and no payment is made to the Government of interest upon the advance. In other words, the all-American canal will be constructed with moneys taken from this fund, and no interest whatever will be paid to the Government by those who get that enormous sum.

"Mr. PHIPPS. The Senator is correct.

"Mr. KING. So that the \$140,000,000, then, does not draw interest.

"Mr. PHIPPS. No; it does not all draw interest. The Senator is correct in that regard."

The bill passed the Senate the day following the discussions above quoted.

Just before its passage two amendments, offered by Senator Pittman, were adopted, which further clarified the differentiation of the canal from the dam and power plant project and the question whether interest was to be paid upon advances for construction of the canal. In the earlier discussions, concern had been expressed that the amendments proposed by the committee did not sufficiently segregate the canal and that there was danger that revenues from power might be reached to guarantee or underwrite any deficiency in the moneys received under the reclamation law to pay for the canal. (Cong. Rec., vol. 69, pp. 9456-7, 9458, 10495; vol. 70, p. 288; see also minority views, Sen. Rept. 592, pt. 2, pp. 25-26.)

Senator Pittman's first amendment (*id.*, vol. 70, p. 575) was to insert in section 1, following the committee amendment that expenditures for the canal should be reimbursable as provided in the reclamation law, the provision—

"and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy at the dam authorized to be constructed at said Black Canyon or Boulder Canyon, or for water for potable purposes outside of the Imperial and Coachella Valleys."

Explaining that amendment he said:

"It has been understood that the cost of building the all-American canal will not be imposed as an obligation on the revenues derived from the power developed at the power house at the Boulder or Black Canyon Dam. I desire now to offer an amendment which will make that entirely clear. Although the bill already has a provision of that kind, it is not as yet sufficiently definite."

After the adoption of that amendment Senator Pittman immediately introduced an amendment to section 4 (b), changing it to the form in which it now appears in the law. In explaining that amendment he said (*id.*, p. 576):

"Mr. PITTMAN. Now, Mr. President, in order to make the bill harmonious, having segregated the all-American canal, the reclamation project, from the Boulder Dam, the Black Canyon Dam, and the power-house project, it is essential to make subdivision (b) in section 4, on page 5, to conform to that."

The amendment was adopted and the bill as so amended passed the Senate on December 14, 1928 (*id.*, p. 603). The House concurred in the Senate amendments and passed the bill on December 18 (*id.*, pp. 830-838) without specific discussion of the interest question.

I have above pointed out that the first paragraph of section 4 (b), as thus amended and passed, requires the Secretary of the Interior to make provision for revenues adequate in his judgment for the repayment of the advances for the dam and power plant "with interest thereon, made reimbursable under this Act," whereas the second paragraph, relating to repayment of the costs of construction of the main canal and appurtenant structures "in the manner provided in the reclamation law" makes no reference to interest. In view of the legislative history and especially of the debates in the Senate immediately preceding the adoption of the amendment to section 4 (b), I can not regard this differentiation as accidental. Its purpose was to harmonize that section with the rest of the bill treating the canal as a purely reclamation project, and the provisions that the sums expended for its construction should be "reimbursable as provided in the reclamation law" were, in my judgment, intended to relieve advances from the Treasury for that purpose from any interest charge.

In view of the legislative history above outlined, I think that the qualification, "except as herein otherwise provided," to the requirement in section 2 (b) of the payment of interest on all sums advanced can not be regarded as referring exclusively to the case of the deferment of interest payments under section 2 (d). In my judgment, Congress must be considered to have "otherwise provided" with respect to interest on the cost of construction of the All-American canal, and the expressions in section 2 (c), (d) and (e), section 5, and section 7, must be deemed to refer only to such interest as is made payable by the Act construed as a whole.

It is my opinion, therefore, that advances from the General Treasury to the Colorado River Dam Fund for construction costs of the All-American Canal are not interest-bearing.

With respect to the branch of your question which relates to whether disbursements from the fund for that purpose should be interest-bearing, I understand from your letter of December 11 that the only purpose of that inquiry was to bring up the question of the time from which interest on advances from the General Treasury should be computed if interest is chargeable at all. In view of my opinion, above expressed, consideration of that question is not necessary.

II

Your second question is as follows:

"In fixing the sale rates for power to be generated at Boulder Dam, must provision be made for amortization within fifty years, of the \$25,000,000 allocated by the Act for flood control?"

The provisions of the Act requiring the Secretary of the Interior to make provision for revenues to insure repayment of sums expended for the various constructions contemplated by the Act are found in section 4 (b). Flood control is one of the purposes recited in section 1 and was to be secured chiefly by means of the dam and incidental works at Black Canyon or Boulder Canyon. The first paragraph of section 4 (b) relates to those works and, if it stood alone, would require the Secretary of the Interior to make provision for revenues by contract adequate in his judgment to insure repayment within fifty years of all amounts advanced from the Treasury under section 2 (b) for their construction.

Section 2 (b) itself, however, after authorizing the Secretary of the Treasury to advance to the fund such sums as the Secretary of the Interior deems necessary for carrying out the provisions of the Act, not exceeding \$165,000,000, provides:

"Of this amount the sum of \$25,000,000 shall be allocated to flood control and shall be repaid to the United States out of 62½ per centum of revenues, if any, in excess of the

amount necessary to meet periodical payments during the period of amortization, as provided in section 4 of this Act. If said sum of \$25,000,000 is not repaid in full during the period of amortization, then 62½ per centum of all net revenues shall be applied to payment of the remainder."

The above language provides a plan of repayment of the \$25,000,000 allocated to flood control which is different from the method prescribed in section 4 (b). Congress manifestly contemplated that 62½ per cent of the excess revenues might not be sufficient to repay this sum within the fifty-year period of amortization therein specified, and provided that in that event 62½ per cent of all net revenues should be devoted to its payment. These special provisions are controlling.

The language of section 2 (b) shows clearly that Congress did not regard the \$25,000,000 thereby allocated to flood control as falling within the amortization plan embodied in section 4 (b). If this \$25,000,000 were regarded as falling within the requirements of the first paragraph of section 4 (b), the revenues which the Secretary of the Interior would thereby be required to provide therefor would be embraced in the words, "the amount necessary to meet periodical payments during the period of amortization, as provided in section 4 of this Act," in section 2 (b), and the provision in the latter section that during this fifty-year period repayment should be made only out of 62½ per centum of the revenues, if any, "in excess" of that amount would be meaningless. Section 4 (b) cannot be construed as embracing the sum allocated for flood control without producing plain repugnance between that section and section 2 (b). I am therefore of the opinion that the \$25,000,000 allocated to flood control must be regarded as falling outside of the words "all amounts advanced to the fund under subdivision (b) of section 2 for such works" in section 4 (b).

This construction of the Act is confirmed by reference to its legislative history.

The provision of section 2 (b), above quoted, was brought into the Act by an amendment offered only a few days before the passage of the bill, by Senator Phipps, the chairman of the Committee on Irrigation and Reclamation, which

reported out the bill. Up to that time section 2 (b) had consisted only of the first and last sentences thereof. Prior to the presentation of Senator Phipps' amendment, Senator Ashurst had offered an amendment on the same subject which would have allocated \$30,000,000 to flood control and made this sum not reimbursable at all. (Cong. Rec., vol. 69, p. 10466.) The first form of the amendment offered by Senator Phipps, on December 11, 1928, was to insert after the first sentence of section 2 (b) a single sentence as follows:

"Of this amount the sum of \$25,000,000 shall be allocated to flood control, and shall not be repaid to the United States except out of revenues, if any, in excess of the amount necessary to meet periodical payments during the period of amortization as provided in section 4 of this act."

In supporting this proposed amendment Senator Phipps said (Cong. Rec., vol. 70, p. 399):

"I have given my reason for believing that the amount of \$25,000,000 included in that figure should be considered as a deferred payment, namely, that the Federal Government certainly has an obligation resting upon it to provide flood control for the lower reaches of the Colorado River territory; and the figure of \$25,000,000 is a little less than the figure which has been estimated as the cost of a dam located at the most convenient and available point for the purposes of flood control alone."

The next day, December 12, the amendment was altered to the form in which it now appears in the Act (*id.*, p. 459). On the day following, December 13, the proposed amendment was debated and passed the Senate (*id.*, pp. 520-522).

In the discussion of Senator Phipps' amendment in both forms, the understanding was expressed by several of the Senators that the proposed \$25,000,000 allocation would be substantially a contribution by the United States for flood control (*id.*, pp. 399-401). The amendment was supported not only on the ground that the Government owed an obligation to provide flood control, but on the ground that the amortization plan might not be feasible unless such a contribution were made. The report of the Board of Engineers (Document No. 446, H. R. 70th Cong., 2d sess.), re-

ferred to in my discussion of your first question, which was submitted on December 3, 1928, and related to the House bill, concluded with the following language:

"Based on the foregoing and the shortage of power which will occur at low flow, the board is of the opinion that if the Boulder Canyon project is completed and put in operation, carrying as it does the costs of flood-protection works and the all-American canal, it will be impossible to meet operation, maintenance, interest, and a sufficient sinking fund to retire the cost of the project within a 50-year period.

"4. It is obvious that the power which can be generated from Boulder Dam is a valuable resource. If the income from storage can be reasonably increased and the capital investment reduced by the cost of the all-American canal, together with a reduction for all or a part of the cost properly chargeable to flood protection, it would be possible to amortize the remaining cost with the income from power."

This report was reprinted in the Congressional Record (vol. 70, pp. 280-285) and reference was made in the debate to the above recommendation, as it related to flood control (Cong. Rec., vol. 70, pp. 71, 399, 521-522).

The change made in the first sentence of the amendment was thus explained by Senator Johnson (*id.*, p. 520):

"The reason for that insertion, I assume, of sixty-two and one-half per cent. of the revenues is because in the bill [Section 4 (b), last paragraph] thirty-seven and one-half per cent. of what I may term the excess revenues, or what I think might be designated as profits, are allocated to the two States of Arizona and Nevada in equal shares; and I assume that the purpose of the amendment is, out of the remainder of this sixty-two and one-half per cent to pay, if it can be paid, the allocation of \$25,000,000 for flood control."

The same explanation had been made by Senator Phipps (*id.*, p. 473).

It is apparent that the so-called excess revenues, out of 62½ per cent of which alone was to come repayment during the period of amortization of any part of the \$25,000,000 allocated to flood control, were the same excess revenues which under the last paragraph of section 4 (b) were to be paid as to 18¾ per cent to the State of Arizona and as to

18¾ per cent to the State of Nevada. Manifestly, it was not the intention of Congress that section 4 (b) should require the Secretary of the Interior to make provision by his contracts to insure any payments to those States during the fifty-year period. This was recognized in the debates on the bill. (Cong. Rec., vol. 69, pp. 7390-7391, 10502.) There is no greater reason to suppose that Congress intended that he should be required to make provision for repayment of the sums allocated to flood control. The "revenues in excess of the amount necessary to meet periodical payments" which during the fifty-year period of amortization were to be the sole source both of the payments to the States of Arizona and Nevada and of the repayment of the \$25,000,000 allocated to flood control were by necessary implication excluded from the revenues for which the Secretary of the Interior was required to make provision under the first paragraph of section 4 (b).

It is my opinion, therefore, that the Secretary of the Interior is not required, in fixing the sale rates for power to be generated at Boulder Dam to make provision for the amortization within the fifty years of the \$25,000,000 allocated by the Act to flood control.

III

Your third question is as follows:

"Must provision be made for payment out of the power proceeds, during the fifty year period of amortization of interest upon the principal of the \$25,000,000 allocated to flood control. If so, should interest start to run from the first appropriation made from the General Treasury to the Colorado River dam fund?"

With respect to the matter of interest upon the principal of the \$25,000,000 allocated to flood control, the Act is very ambiguous. I have had great difficulty in reaching a satisfactory conclusion as to what Congress intended in respect of this item. The Act is susceptible of any one of these interpretations:

First, that no interest is to be paid under any circumstances or out of any source of revenue on the \$25,000,000 allocated to flood control, or

Second, that such interest must be paid and that it is payable annually during the fifty-year period of amortization, and that the power rates should be fixed at a high enough figure to pay such interest during the fifty-year period, or

Third, that it was the intention of Congress that interest should be paid on the principal of the amount allocated to flood control, but that such interest is not required to be paid absolutely during the fifty-year period and is only to be paid, as is the principal of the item, out of 62½ per cent of excess earnings, if any, during the fifty-year period and out of the 62½ per cent net earnings after the expiration of that period.

It does not seem reasonable to suppose that Congress intended to make the payment of interest on the \$25,000,000 allocated to flood control an absolute charge during the fifty years when it left the payment of the principal to the chance that there might be excess earnings during that period. I am inclined to believe that Congress intended that interest should be ultimately paid on the \$25,000,000 allocated to flood control from the same source as is provided for the payment of the principal, to-wit: out of 62½% of the excess earnings during the fifty-year period and out of 62½% of the net earnings thereafter.

The word "thereon" in section 4 (b) following the word "interest" in the phrase "all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this Act" apparently limits the requirement, with respect to interest, to interest on such principal sums as are embraced within the scope of the paragraph.

A construction of the Act as not absolutely requiring the fixing of rates high enough to cover the payment of interest during the fifty-year amortization period upon the \$25,000,000 allocated to flood control is entirely consonant with the apparent purposes of Congress in adopting the amendment which made that allocation, namely, to discharge a governmental obligation to provide flood control, and to make the project more probably feasible by reducing the amount which would have to be amortized out of revenues obtained from power and water at the dam.

It does not seem necessary to pass further upon the question of the ultimate payment of interest, as I am of the opinion that if such interest is ultimately payable, the Act does not require you to make provision for its payment out of power proceeds during the fifty-year period of amortization.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE INTERIOR.

MILITARY STATUS OF WILLIAM C. SILLIMAN UNDER THE
EMERGENCY OFFICERS' RETIREMENT ACT

William C. Silliman, who, while an officer of the Fourth Cavalry Regiment, Texas National Guard, was assigned to duty at the Central Officers' Training School at Camp Stanley, Texas, and received training there from September 25, 1918, to December 8, 1918, but who was never mustered into the military service of the United States, is not one of the "persons who have served as officers of the Army * * * of the United States during the World War, other than as officers of the Regular Army * * *" within the meaning of that language as used in the Emergency Officers' Retirement Act (45 Stat. 735), and hence is not entitled to the benefits of that Act.

DEPARTMENT OF JUSTICE,

December 31, 1929.

SIR: I have the honor to comply with your request of August 8, 1929, for an opinion upon the question whether one William C. Silliman, if otherwise qualified, is entitled to retirement under the Emergency Officers' Retirement Act of May 24, 1928, 45 Stat. 735, by reason of the fact that while an officer of the Fourth Cavalry Regiment, Texas National Guard, he was assigned to duty and received training for a certificate of proficiency at the Central Officers' Training School at Camp Stanley, Texas, from September 25, 1918, to December 8, 1918, inclusive. The Emergency Officers' Retirement Act, supra, provides:

"That all persons who have served as officers of the Army, Navy, or Marine Corps of the United States during the World War, other than as officers of the Regular Army, Navy, or Marine Corps who during such service have incurred physical disability in line of duty, and who have been, or may hereafter, within one year, be, rated in accord-

ance with law at not less than 30 per centum permanent disability by the United States Veterans' Bureau for disability resulting directly from such war service, shall, from date of receipt of application by the Director of the United States Veterans' Bureau, be placed upon, and thereafter continued on, separate retired lists, hereby created as part of the Army, Navy, and Marine Corps of the United States, to be known as the emergency officers' retired list of the Army, Navy, or Marine Corps of the United States, respectively, with the rank held by them when discharged from their commissioned service, and shall be entitled to the same privileges as are now or may hereafter be provided for by law or regulations for officers of the Regular Army, Navy, or Marine Corps who have been retired for physical disability incurred in line of duty, and shall be entitled to all hospitalization privileges and medical treatment as are now or may hereafter be authorized by the United States Veterans' Bureau, and shall receive from date of receipt of their application retired pay at the rate of 75 per centum of the pay to which they were entitled at the time of their discharge from their commissioned service, except pay under the Act of May 18, 1920: *Provided*, That all pay and allowances to which such persons or officers may be entitled under the provisions of this law shall be paid solely out of the military and naval compensation appropriation fund of the United States Veterans' Bureau, and shall be in lieu of all disability compensation benefits to such officers or persons provided in the World War Veterans' Act, 1924, and amendments thereto, except as otherwise authorized herein, and except as provided by the Act of December 18, 1922: *Provided further*, That all persons who have served as officers of the Army, Navy, or Marine Corps of the United States during the World War, other than as officers of the Regular Army, Navy, or Marine Corps, who during such service have incurred physical disability in line of duty, and who have heretofore or may hereafter be rated less than 30 per centum and more than 10 per centum permanent disability by the United States Veterans' Bureau, for disability resulting directly from such war service, shall, from date of receipt of application by the Director of the United States Veterans' Bureau, be placed upon, and thereafter continued on, the

appropriate emergency officers' retired list, created by this Act, with the rank held by them when discharged from their commissioned service, but without retired pay, and shall be entitled only to such compensation and other benefits as are now or may hereafter be provided by law or regulations of the United States Veterans' Bureau, together with all privileges as are now or may hereafter be provided by law or regulations for officers of the Regular Army, Navy, or Marine Corps who have been retired for physical disability incurred in line of duty: *And provided further*, That the retired list created by this Act of officers of the Army shall be published annually in the Army Register, and said retired lists of officers of the Navy and Marine Corps, respectively, shall be published annually in the Navy Register.

"SEC. 2. No person shall be entitled to benefits under the provisions of this Act except he make application as hereinbefore provided and his application is received in the United States Veterans' Bureau within twelve months after the passage of this Act: *Provided*, That the said director shall establish a register, and applications made hereunder shall be entered therein as of the actual date of receipt, in the order of receipt in the Veterans' Bureau, and such register shall be conclusive as to date of receipt of any application filed under this Act. The term 'World War,' as used herein, is defined as including the period from April 6, 1917, to July 2, 1921."

Under date of December 8, 1917, the War Department authorized the State of Texas to organize two brigades of cavalry which when trained were to be mustered into the service of the United States to be used on the border to replace regular regiments of the United States Cavalry which were to be ordered overseas. They were to be paid by the State of Texas and trained at home stations and were to be mobilized when their training had been completed. They were mustered into the service of the State of Texas on August 15, 1918, but continued to train at home and to retain their civil occupations. On September 14, 1918, the Provost Marshal General (General Crowder) telegraphed the Governor of Texas, as follows:

"* * * Unless and until National Guard units have been designated for draft into military service of United

States, men enlisted therein are subject to draft by their local boards in accordance with their class and order * * * Militia Bureau advise that Second, Third, Fourth, Fifth, Sixth, and Seventh Cavalry * * * Regiments of Texas National Guard have been designated for draft * * * Registrant members of designated units enlisted prior to designation are in military service of United States, should be in Class Five and are not subject to draft. Registrants who are members of units not yet designated or who enlisted in designated units subsequent to designation are subject to orders by their local boards to report for service and National Guard officials have no authority to prevent such registrants from reporting * * *."

William C. Silliman, the claimant herein, enlisted as a private, first class, Signal Enlisted Reserve Corps on April 3, 1918, and was honorably discharged on June 27, 1918, to accept a commission as first lieutenant in the Fourth Cavalry Regiment, Texas National Guard, which commission was granted him by the Governor of Texas, on July 20, 1918. He was promoted to captain on November 2, 1918. While an officer of this regiment he was ordered to active duty at the Central Cavalry Officers' Training School at Camp Stanley, Texas. This training school was established on or about September 25, 1918, for the purpose of training the officers of the six Texas National Guard Cavalry Regiments, under authority of the War Department which provided that only those officers who proved their efficiency would be called into the service of the United States.¹ On the

¹ The instructions for conducting this training school are contained in the following letter from the Militia Bureau, War Department, to the Officer in Charge of Militia Affairs, Southern Department, dated September 28, 1918:

"1. This bureau has been informed that the War Department has authorized the commanding general, Southern Department, to establish a training camp for cavalry officers in his department. The attendance of officers in the two cavalry brigades of the National Guard of Texas who have been extended Federal recognition by this Bureau and not to exceed twelve enlisted men (noncommissioned officers, if available) from each troop has been authorized. The attendance of officers is not compulsory but optional.

"2. The object of authorizing the attendance of the officers of the two cavalry brigades of the Texas National Guard is to afford them an opportunity to make themselves proficient in the duties of the grades for which they have been authorized by this Bureau and to which Federal recognition has been extended, subject to the examinations provided in section 75, Bulletin 16, War Department, June 22, 1916, and the regulations thereunder, as prescribed in Circulars 13 and 23, Militia Bureau, 1916. Those who fail to qualify for the grades to which appointed will not be inducted when their

establishment of this school the officers in question reported on orders issued by the authorities of the State of Texas. On September 24, 1918, the Acting Chief of the Militia Bureau, War Department, directed a communication to The Adjutant General of the Army in which he advised that the regiments in question had just been organized and recognized by the Militia Bureau but that they were still National Guard troops in State service. At the instance of the Governor of Texas, the Commanding General of the Southern Department, on September 28, 1918, requested the War Department to fix a time for calling the trainees of this officers' training school into the Federal service. In accordance with this request, the War Department advised, under date of November 1, 1918, that these regiments would be called into the service on January 2, 1919. However, on November 20, 1918, the Secretary of War advised the Governor of Texas that the signing of the armistice had made it unnecessary to

organizations are brought into Federal service, and the Federal recognition extended to them by this Bureau will be withdrawn.

"3. The period of three months has been authorized for the attendance of these officers and enlisted men at this camp. Those line officers who attend this camp will, before leaving same, be required to take an examination in the subjects prescribed for the cavalry arm of the service, and those belonging to the staff corps will be required to take an examination in the subjects prescribed for these corps in Circulars 13 and 23, Militia Bureau, 1916. In cases not covered in these circulars, the department commander will prescribe the subjects for examination to determine the officer's qualification to hold the grade in which he was appointed.

"4. Officers belonging to the two brigades of cavalry who do not attend this camp of instruction will be given the prescribed examination at any time before the camp is closed. Those officers refusing to take the examination, or who permanently leave the camp of instruction prior to the completion of the course will be reported at once to this Bureau, giving the reasons therefor.

"5. Daily class records and proficiency in practical work should be kept for each officer and presented to the examining boards for their consideration. If these records and the recommendations of the instructors in the various subjects show that the officer undergoing examination is qualified for the grade in which he was appointed, a certificate to that effect will be issued him and a copy furnished this Bureau. The certificate of proficiency will show, in addition to his professional qualifications, that he is physically qualified for active field service, which must be determined by a board of at least two medical officers.

"6. Those officers who fail to qualify and are not awarded certificates of proficiency in accordance with the preceding paragraph will be required to take a written examination on the subjects prescribed in Circulars 13 and 23 for the several arms of the service. The proceedings of the boards in such cases will be made on prescribed forms furnished by this Bureau. The boards can recommend officers for a lower grade than that in which they were appointed.

"7. These examinations will be conducted by a board or boards of officers appointed by the War Department, upon recommendation of the department

call the six regiments of Cavalry of the Texas National Guard into the Federal service as originally planned, but stated that the officers' training camp at Camp Stanley, Texas, might be continued in order to permit those who had participated in that training to complete the prescribed course. William C. Silliman completed the prescribed course of training and was relieved from duty on December 8, 1918, at which time he was awarded a certificate of eligibility to hold his commission as captain of Cavalry.

Mr. Silliman contends that by reason of the training which he received while a member of the Fourth Cavalry

commander, in accordance with the provisions of section 75, Bulletin 16, War Department, 1916.

"8. If at any time the moral character, capacity, or general fitness for the service of a National Guard officer is in question, action under the provisions of section 77, Bulletin 16, War Department, 1916, and the regulations thereunder, as set forth in paragraph 7, Bulletin 21, Militia Bureau, 1916, will be taken. Duplicate copy of proceedings will be furnished this Bureau.

"9. The enlisted men were authorized for attendance at this camp with a view of training them for the duties of noncommissioned officers. Those found unfitted should not be retained at camp but returned to their organizations as privates, and their names should be reported to this Bureau.

"10. The program of instruction will, as far as practicable, cover the subjects prescribed in Circular 13, Militia Bureau, 1916, in which the officers are to be examined. Daily class record and proficiency in practical work should be given considerable weight by the boards conducting the examinations. A copy of the program of instruction, in so far as it pertains to National Guard officers, will be furnished this Bureau for approval.

"11. Authority has been granted to permit the medical officers and seven enlisted men, including four noncommissioned officers, assigned to the sanitary detachment of each cavalry regiment, and also eight dental surgeons to attend the Medical Officers' Training Camp at Fort Oglethorpe, Georgia, for a three months' course of instruction. The enlisted men will be selected by the department commander upon recommendation of the State authorities. The names of the medical officers and dental surgeons who desire to attend this camp should be immediately submitted to this Bureau in order that it may be determined whether or not their eligibility has been passed upon by this Bureau and their appointment authorized. As soon as this information is received, you will be authorized to send these men to Fort Oglethorpe, Georgia.

"12. Transportation and pay of officers and transportation, pay, and subsistence of the enlisted personnel during their attendance at this camp are proper charges against the Federal funds appropriated for the National Guard. Estimates covering the above items should be submitted to this Bureau at the earliest practicable date, and a request made that the amounts estimated be allotted to the department commander for this purpose.

"13. Upon completion of this camp, a detailed report will be made to this Bureau covering the operations and activities of this camp in so far as they pertain to the National Guard personnel sent there for instruction. As soon as the camp is established, this Bureau should be furnished with a roster of the officers and enlisted men in attendance thereat, together with their rank and the organizations to which they belong.

"14. You should take up with the department commander at the earliest practicable moment all the matters to which your attention has been called in this letter."

Regiment, Texas National Guard, assigned to duty at the Central Officers' Training School at Camp Stanley, Texas, he is one of the "persons who have served as officers of the Army * * * of the United States during the World War, other than as officers of the Regular Army * * *" within the meaning of that language as used in the Emergency Officers' Retirement Act of May 24, 1928, *supra*, and therefore, is entitled to the benefits of that Act.

The term "Army of the United States" is defined in section 1 of the National Defense Act of June 3, 1916, 39 Stat. 166, as follows:

"That the Army of the United States shall consist of the Regular Army, the Volunteer Army, the Officers' Reserve Corps, the Enlisted Reserve Corps, the National Guard while in the service of the United States, and such other land forces as are now or may hereafter be authorized by law."

Under this Act members of the National Guard are only a part of the Army of the United States "while in the service of the United States." *State v. Industrial Commission*, 186 Wis. 1; *R. & Nav. Co. v. United States*, 60 Ct. Cl. 458; *Illinois Cent. R. Co. v. United States*, 60 Ct. Cl. 499.

The rule of construction is that Congress is presumed to use words in their ordinary and commonly accepted meaning, unless that sense is repelled by the context. The meaning of the word "service" as used and understood in our military system was stated by Attorney General Griggs in 23 Op. 406, to be as follows (pp. 407, 408):

"It seems clear that the word 'served' in this section (section 1219 R. S.) is used in the same restricted and technical sense with which the word 'service' is used in connection with our military system. As to when such service commences there can be no question. As you state, every department of the Government which has had occasion to construe this word has, by long-continued and uniform decisions and practice, held that, in case of volunteer officers commissioned by the governors of States, their entry into the military service of the United States dates from their muster in; and in case of volunteer officers appointed by the President, by and with the advice and consent of the Senate, their service dates from their acceptance of their com-

missions and oath of office. There are substantial reasons for this construction of the word 'service.' The enrollment of a person for service in the Volunteer Army is only a declaration of his intention to enter such service. He may, or may not, actually enter the service by formal muster in; he may refuse to be mustered in after enrollment, and it has been decided by your and this Department that if he does so he does not thereby become a deserter. Again, if he is willing to enter the service, he may, for various reasons, be rejected by the officer in charge of the muster in, and if rejected he has never been actually or constructively in the service of the United States Army. In other words, to give a citizen the status of a United States soldier in the Volunteer Army his consent and that of the United States are both necessary, and the formality which marks this agreement of the two parties to the contract, and the commencement of the obligations thereunder, is the muster in, an old institution, which is a part of our military system we inherit from England. The muster in fixes the time of the commencement of the military service, and the muster out marks the termination of such service." (Words in parenthesis supplied.)

Hence, it may be presumed that Congress has used the word "service" in section 1 of the National Defense Act, supra, and in the Emergency Officers' Retirement Act, supra, in the sense that, as to "volunteer officers commissioned by the governors of States, their entry into the military service of the United States dates from their muster in." (23 Op., supra.)

Section 111 of the National Defense Act, supra, provides (p. 211):

"When Congress shall have authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those of the Regular Army, the President may, under such regulations, including such physical examination, as he may prescribe, draft into the military service of the United States, to serve therein for the period of the war unless sooner discharged, any or all members of the National Guard and of the National Guard Reserve. All persons so drafted shall, from the date

of their draft, stand discharged from the militia, and shall from said date be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Volunteer Army, and shall be embodied in organizations corresponding as far as practicable to those of the Regular Army or shall be otherwise assigned as the President may direct. The commissioned officers of said organizations shall be appointed from among the members thereof, officers with rank not above that of colonel to be appointed by the President alone, and all other officers to be appointed by the President by and with the advice and consent of the Senate. Officers and enlisted men in the service of the United States under the terms of this section shall have the same pay and allowance as officers and enlisted men of the Regular Army of the same grades and the same prior service." (39 Stat. 211.)

Mr. Silliman having been an officer commissioned by the Governor of Texas, and not having been mustered or drafted into the military service of the United States, is clearly not one of the "persons who have served as officers of the Army * * * of the United States during the World War, other than as officers of the Regular Army * * *" within the meaning of that language as used in the Emergency Officers' Retirement Act, *supra*, unless, as Mr. Silliman contends, he became an officer of the United States Army by reason of the fact that the National Guard Organization of which he was an officer, was recognized by the Militia Bureau of the War Department as being within the provisions of the Selective Service Regulations promulgated by the President on November 8, 1917, under the Selective Service Act of May 18, 1917, 40 Stat. 76. The regulations in question provide (Selective Service Rules, Part II, p. 40, Note 3) :

"The words 'persons in the military and naval service of the United States,' as employed in said Act of Congress and in these Regulations, shall be construed as including all officers and enlisted men of the Regular Army, the Regular Army Reserve, the Officers' Reserve Corps, and the Enlisted Reserve Corps; all officers and enlisted men of the National Guard and National Guard Reserve recognized by the

Militia Bureau of the War Department; all officers and enlisted men of the Navy, the Marine Corps, and the Coast Guard; all officers and enlisted men of the Naval Militia, Naval Reserve Force, Marine Corps Reserve, and National Naval Volunteers recognized by the Navy Department; all officers of the Public Health Service detailed by the Secretary of the Treasury for duty either with the Army or the Navy; and any of the personnel of the Lighthouse Service and of the Coast and Geodetic Survey transferred by the President to the service and jurisdiction of the War Department or of the Navy Department."

The language "all persons in the military and naval service of the United States" appears only in section 4 of the Selective Service Act, *supra*, p. 78. Section 4 provides:

"That the Vice President of the United States, the officers, legislative, executive, and judicial, of the United States and of the several States, Territories, and the District of Columbia, regular or duly ordained ministers of religion, students who at the time of the approval of this Act are preparing for the ministry in recognized theological or divinity schools, and *all persons in the military and naval service of the United States* shall be exempt from the selective draft herein prescribed * * *." (*Italics supplied.*) (40 Stat. 78.)

Hence, the Selective Service Regulations quoted above, so far as the Selective Service Act is concerned, were promulgated for the purpose of effectuating the provisions of section 4 thereof. The language of section 4 makes it clear that that section was designed to exempt certain persons and classes of persons from the operation of the Selective Service Act, *supra*. The rule is that where regulations are promulgated to effectuate the provisions of a statute, their scope and effect can not extend beyond the purpose of the statute. *Morrill v. Jones*, 106 U. S. 466. In the light of this rule, it is obvious that the Selective Service Regulations, *supra*, were not intended to and do not determine the military status of Mr. Silliman.

The War Department has declined to award the Victory medal to the members of the six cavalry regiments of the Texas National Guard. In a letter dated August 8, 1921 (House Report No. 217, p. 4, 68th Cong. 1st sess.), Honor-

able J. M. Wainwright, Acting Secretary of War, advised Representative Harry Wurzbach (of Texas), member of the House Committee on Military Affairs, as follows:

"General Harbord has informed me of your recent conference with him, at which time you left in his possession the letter of Mr. W. B. Tuttle, of San Antonio, in which he asks that the Victory medal be awarded to Texas National Guard cavalry regiments. I have gone into the matter very carefully, and I beg to advise you that the present policy of the War Department has consistently been to restrict the issue of the Victory medal to officers and enlisted men who served on active duty in the Army of the United States between April 6, 1917, and November 11, 1918. It is clear that the Texas National Guard cavalry regiments never came into Federal service and therefore are not under the provisions of the award of our Great War medal."

* * * * *

Thereafter, on April 16, 1924, Congress enacted the following statute (43 Stat. 100):

"That the Secretary of War be, and he is hereby, authorized and directed to procure a bronze medal of appropriate design, with a bar and ribbon, together with a rosette or other device to be worn in lieu thereof, to be presented to each of the several officers and enlisted men of the two brigades of cavalry organized by the State of Texas, under authority from the War Department of date of December 8, 1917, who served therein prior to November 11, 1918: * * * *Provided*, This Act shall not be considered as conferring upon the members of said organizations the benefits of the War Risk Insurance Act or to confer a pensionable status to the members of said organizations, and that this Act shall not be deemed to constitute a precedent for the future granting of such rights."

This Act, and especially its proviso, indicates that Congress did not regard these Texas National Guard regiments as having been in the Army of the United States during the World War.

For the reasons stated, it is my opinion that William C. Silliman is not one of the "persons who have served as officers of the Army * * * of the United States during

the World War, other than as officers of the Regular Army * * * " within the meaning of that language as used in the Emergency Officers' Retirement Act of May 24, 1928, supra, and hence is not entitled to the benefits of that Act.

Respectfully,

WILLIAM D. MITCHELL.

To DIRECTOR, UNITED STATES VETERANS' BUREAU.

PENSION CLAIM OF SIDNEY FLOYD LOVE

Sidney Floyd Love, an enlisted man in the Navy, was detailed as night master-at-arms in the United States naval hospital, Great Lakes, Ill., with tour of duty from 9 p. m. to 8 a. m., and liberty from 1 p. m. to 8.30 p. m. On July 12, 1926, he checked out on liberty at 6 p. m., and while returning to his post of duty on his own motorcycle between 8 and 8.30 p. m., he was caught between two automobiles and his right ankle crushed between the running board of one of the automobiles and his motorcycle. *Held*, upon the facts stated and assumed, that he is entitled to a pension.

The requirement of section 4694 of the Revised Statutes that an applicant for a pension in the naval service must, at the time his injury is sustained, be "at some naval station * * * or hospital," is satisfied if he is regularly reporting for and discharging his assigned duties there, and his right to a pension is not defeated by reason of the fact that he was injured while absent on a pass or permission of such short duration as not to interfere with such duties.

The fact that Love's injury was sustained while he was outside of the boundaries of the naval station or hospital on a few hours' liberty does not in itself necessitate the conclusion that he was not injured "in the line of duty" or not entitled to a pension.

DEPARTMENT OF JUSTICE,

January 6, 1930.

SIR: I have the honor to comply with your request for an opinion "as to whether the views expressed by former Attorney General Palmer in his opinions of August 21, 1919, and June 2, 1920 (32 Ops. Atty. Gen. 12, 193), on the meaning of the expression 'in line of duty,' as used in the War Risk Insurance Act of June 25, 1918 (40 Stat. 609, 611), should be applied in the adjudication of pension claims where that term is involved." While your letter states the question in the general terms above quoted, you submit with

it an opinion of the Solicitor of your Department dealing with the claim of one Sidney Floyd Love for a pension under sections 4692 and 4693 of the Revised Statutes (U. S. C., Title 38, secs. 151 and 152), and your Department has later advised that your letter should be construed as a request for an opinion upon the Love case, the facts of which are stated in the Solicitor's opinion substantially as follows:

Love was enlisted in the Navy, detailed as night master-at-arms in the United States naval hospital, Great Lakes, Ill., with tour of duty from 9 p. m. to 8 a. m., and liberty from 1 p. m. to 8.30 p. m. On July 12, 1926, he checked out on liberty at 6 p. m., and while returning to his post of duty on his own motorcycle between 8 and 8.30 p. m., he was caught between two automobiles and his right ankle crushed between the running board of one of the automobiles and his motorcycle. The medical report states that he showed no evidence of being under the influence of alcoholic liquor, and no negligence was apparent. His leg was amputated at six inches above the knee. The Navy Department has furnished him with an artificial limb with which he is able to walk fairly well. The injury was reported as having occurred in line of duty and he was honorably discharged on April 8, 1927, on the recommendation of the Board of Medical Survey.

Section 4692, R. S. (U. S. C., Title 38, section 151), provides:

"Every person specified in the several classes enumerated in the following section, who has been, since the fourth day of March, eighteen hundred and sixty-one, or who is hereafter disabled under the conditions therein stated, shall, upon making due proof of the fact, according to such forms and regulations as are or may be provided in pursuance of law, be placed on the list of invalid pensioners of the United States, and be entitled to receive, for a total disability, or a permanent specific disability, such pension as is hereinafter provided in such cases; and for an inferior disability, except in cases of permanent specific disability, for which the rate of pension is expressly provided, an amount proportionate to that provided for total disability; and

such pension shall commence as hereinafter provided, and continue during the existence of the disability."

Section 4693, R. S., (U. S. C., Title 38, section 152), so far as material here, provides:

"The persons entitled as beneficiaries under the preceding section are as follows:

"First. Any officer of the Army, including regulars, volunteers, and militia, or any officer in the Navy or Marine Corps, or any enlisted man, however employed, in the military or naval service of the United States, or in its Marine Corps, whether regularly mustered or not, disabled by reason of any wound or injury received, or disease contracted, while in the service of the United States and in the line of duty."

* * * * *

The meaning of the phrase "in the line of duty," as used in the War Risk Insurance Act of June 25, 1918, (40 Stat. 609, 611), was fully considered by Attorney General Palmer in the first opinion to which your question refers, dated August 21, 1919 (32 Op. 12), in which he discussed an opinion of Attorney General Cushing, rendered in 1855 (7 Op. 149), with respect to the meaning of the phrase in the pension laws then existing, and reviewed the few judicial decisions which have dealt with the subject. Attorney General Palmer's conclusions are stated as follows. (pp. 19, 22-23):

"* * * The mere fact that an injury or disease is coincident in time with service is not sufficient to class it as suffered or contracted 'in the line of duty.' It must have been caused by the presence of its victim in the line of duty when it was received or contracted. But the relation of causation is sufficiently shown when it appears that the victim was at a place and doing what was required or permitted by his duty as a soldier, and that, between his presence and conduct and the injury or disease, no adequate and sufficient cause, for which he is responsible, intervened. This, I think, is the true meaning of the criterion laid down by Mr. Cushing * * * (7 Op. 149, 162).

* * * * *

"I agree that a leave of absence, an ordinary furlough, or an arrest does not remove a soldier from the active service

But, on duty, on furlough, or under arrest, he may do things both within or without the line of duty which, though entirely free from the imputation of misconduct, may cause injury or disease. While in the active service and submitting to its rules and regulations he is, in general, in the line of duty, and an injury suffered or disease contracted under these circumstances is suffered or contracted in the line of duty unless it is actually caused by something for which he is responsible which intervenes between his service or performance of duty and the injury or disease. He will be responsible for an intervening cause if (1) it consists of his own willful misconduct or (2) it is something which he is doing in pursuance of some private avocation or business." (Words in parenthesis supplied.)

This ruling was approved by Attorney General Sargent, on January 18, 1929 (35 Op. 508, 510), wherein, after quoting in part the above language of Attorney General Palmer, he said:

"I think the above interpretation is the correct one, and applies equally to the phrase (in line of duty) as used in (section 1 of) the Emergency Officers' Retirement Act (of May 24, 1928, 45 Stat. 735)." (Words in parenthesis supplied.)

In the second opinion to which your question refers, dated June 2, 1920 (32 Op. 193), Attorney General Palmer applied to certain specific cases the construction of the phrase which he had earlier expressed. One of these cases was that of an electrician in the United States Naval Reserve Force on duty at Boston, Mass., who was granted liberty on Saturday until the following Monday and was returning on Sunday night from his home in Berlin, N. H., to his post in Boston, when he met his death in consequence of the automobile in which he was traveling being struck by a railroad train. The Attorney General ruled that he was killed "in the line of duty" within the meaning of section 300 of the War Risk Insurance Act, saying (page 197):

"* * * An ordinary furlough or short leave of absence, however, is a part of the disciplinary regulations of the military service, and the furloughed soldier is still, generally speaking, employed in the active service and, I

am convinced, in the line of duty, so long as he complies with the regulations and with the terms of his furlough. Such a furlough, of course, contemplates traveling by the ordinary means, and such accidents as are liable to happen to one so traveling are logical incidents of the service. In the case stated, it was undoubtedly the duty of the electrician to return to his post before the expiration of his furlough. He was doing this when the accident causing his death occurred, there was no intervening cause for which he was responsible, and I am of the opinion that he was in the line of duty within the meaning of the statute."

The Solicitor of your Department states: "The record does not show that close investigation was made in respect to the precise circumstances under which the accident occurred." However, in view of the fact that the record fails to show the presence of any intervening cause for which the claimant was responsible and which would disentitle him to a pension this opinion is based on the assumption that no such intervening cause existed.

The phrase "in the line of duty," in section 4693 of the Revised Statutes, is identical with the phrase construed in the foregoing opinions. If, therefore, sections 4692 and 4693, Revised Statutes, were the only statutes to be considered, it would be clear from the above opinions that Love would be entitled to a pension. Those sections, however, must be read in connection with sections 4694 and 4700, Revised Statutes, which have no counterpart in the War Risk Insurance Act or in the Emergency Officers' Retirement Act.

Section 4694, Revised Statutes (U. S. C., Title 38, section 155), provides:

"No person shall be entitled to a pension by reason of wounds or injury received or disease contracted in the service of the United States subsequent to the twenty-seventh day of July, eighteen hundred and sixty-eight, unless the person who was wounded, or injured, or contracted the disease was in the line of duty; and, if in the military service, was at the time actually in the field, or on the march, or at some post, fort, or garrison, or en route, by direction of competent authority, to some post, fort, or garrison; or, if in the naval service, was at the time borne on the books

of some ship or other vessel of the United States, at sea or in harbor, actually in commission, or was at some naval station, or on his way, by direction of competent authority, to the United States, or to some other vessel or naval station, or hospital."

Section 4700, Revised Statutes (U. S. C., Title 38, section 30), provides:

"Officers absence on sick-leave, and enlisted men absent on sick-furlough, or on veteran-furlough with the organization to which they belong, shall be regarded in the administration of the pension-laws in the same manner as if they were in the field or hospital."

Section 4694 was derived from the Act of July 27, 1868, section 2 (15 Stat. 235), and section 4700 from the Act of June 6, 1866, section 8 (14 Stat. 56, 57). By the Act of March 3, 1873 (17 Stat. 566), entitled "An Act to revise, consolidate, and amend the Laws relating to Pensions", the language of these enactments was changed to substantially their present form. In that Act what is now section 4694 appeared as a proviso to section 1, which enumerated the classes of persons entitled and the conditions under which they would be entitled to a pension (the matter now covered by sections 4692 and 4693), and what is now section 4700 as section 6.

Under section 4694 Love was not entitled to a pension unless at the time he sustained his injury he was "at some naval station * * * or hospital," within the meaning of that section. The question is whether the above-quoted language necessarily requires the actual physical presence of the applicant within the boundaries of the station. Some light is thrown on the intention of Congress in that regard by the correlative expression "was at the time borne on the books of some ship or other vessel of the United States, at sea or in harbor, actually in commission." This language indicates that a sailor attached to a vessel would be within the requirement if his disability occurred while he was on shore liberty in port, at least if this was of such short duration as not to interrupt materially his discharge of his duties. In view of this, it seems illogical to hold that absence for a few hours from a naval station or hospital on liberty or pass *ipso facto* defeats the right to a pension.

The need for recreation and relaxation and the value of brief absences during off-duty hours are well recognized and are no less on shore duty than on sea duty.

Pension legislation is to be liberally construed in favor of the beneficiaries thereof, and limitations on the right to a pension such as those embraced in section 4694 should not be extended beyond the reasonable requirements of the language used.

It appears that a liberal construction of the phrase "at some post" has been given in the case of persons in the Service who are stationed at Washington. An early decision denied pensionable status in such a case. In the opinion of the Secretary of the Interior, dated April 15, 1884, on the claim of Samuel McMonigle (No. 471695), it was said:

"Not every soldier of the army is entitled to pension for disability incurred in the line of duty. On the 27th of July, 1868, Congress passed an act relating to pensions, the 2nd section of which was intended to place restrictions on the right of officers, soldiers and sailors to pension additional to those restrictions previously existing."

It was held that as the applicant was in the general service, Adjutant General's Office, he "was not in the field or on the march or at any post, fort, or garrison or en route to any post, port or garrison," and his claim should therefore be rejected. In a later decision, however, *Claim of Martha M. Frisby (Widow)*, 3 Pension Decisions 344, it was held, in the case of an enlisted man who contracted disease of the lungs while engaged at clerical work in the office of the Surgeon General of the Army at Washington that Washington was a military "post" in the sense intended by section 4694. I understand that this decision has since been generally followed.

In my judgment it is an equally admissible construction of section 4694 that its requirement that the applicant must be "at some post, fort, or garrison," in the case of military service, and "at some naval station * * * or hospital," in the case of naval service, is satisfied if he is regularly reporting for and discharging his assigned duties there, and that one injured while absent on a pass or permission of such short duration as not to interfere therewith is not by

reason of that absence alone excluded from the benefits of the pension laws.

In the present case Love had his regular daily tour of duty from 9 p. m. to 8 a. m., and his daily period of liberty from 1 p. m. to 8.30 p. m. On the day of his injury he was away from the station less than three hours. His absence in no way interrupted his regular discharge of the duties to which he was assigned. In my judgment he was "at some naval station * * * or hospital" within the meaning of the statute.

Under section 4700 officers absent on sick leave and enlisted men absent on sick furlough or veteran furlough are to be regarded in the administration of the pension laws in the same manner as if they were in the field or hospital. The suggestion may be made that application of the maxim *inclusio unius est exclusio alterius* necessitates the conclusion that a wound or injury received or disease contracted during any other kind of absence is not pensionable. In my judgment so broad an exclusion may not properly be implied. The maxim is an aid to interpretation, but the ultimate question is whether Congress intended any exclusion and, if so, the extent thereof. The context in which the word "absent" is used indicates that Congress had in mind extended absences. The expressions "sick leave" and "sick furlough" are apparently synonymous terms, the only difference being that the former applies to officers and the latter to enlisted men. Ordinary illnesses would be treated by the Army or Navy medical officers at the place where the man was stationed. The regulations of the Army and the Navy in effect when the Act of June 6, 1866, from which section 4700 was derived, was enacted, indicate that permission to leave a station for reasons of health was only granted in exceptional cases where, after careful examination, it was determined that this was essential to early recovery. Veteran furlough (now obsolete) also contemplated extended absence, usually of a group or organization.

Sick furlough and veteran furlough both involved absences of such a nature and duration that special treatment of them in the pension laws was appropriate. It is not probable that Congress had in mind ordinary passes or periods of liberty, or intended to legislate concerning them. Whether an offi-

cer or an enlisted man wounded, injured, or taken sick upon such brief liberty would be entitled to a pension would thus be determined by whether he was then "in the line of duty."

Reading sections 4692, 4693, 4694, and 4700, Revised Statutes, together, I have reached the conclusion that the fact that Love's injury was sustained while he was outside of the boundaries of the naval station or hospital on a few hours' liberty does not in itself necessitate the conclusion that he was not injured "in the line of duty" or not entitled to a pension. In so advising you I am not unmindful of the fact that it is stated in the opinion of the Solicitor that the prevailing rule in your Department, subject to various exceptions which he points out, has been that "a soldier or sailor absent from his post of duty not on sick furlough is not in line of duty." I interpret your letter, however, as a request for my independent judgment upon the questions of law submitted, regardless of the former departmental practice.

For the reasons stated, I am of the opinion that Sidney Floyd Love, upon the facts stated and assumed, is entitled to a pension.

Respectfully,

CHARLES E. HUGHES, JR.,

Acting Attorney General.

To The SECRETARY OF THE INTERIOR.

PENSION CLAIM OF PRISCILLA S. LUTZ

Priscilla S. Lutz, widow of an officer of the Marine Corps whose death occurred by reason of injuries received in line of duty, the result of an aviation accident while employed in actual flying, is entitled to one pension for herself and her minor child under sixteen years of age, the issue of her marriage with said deceased officer, either under the provisions of sections 4702 and 4703 of the Revised Statutes, as amended, or under the provisions of the Act of May 1, 1926 (44 Stat. 382).

Claimant must elect the statute under which she will apply for a pension, but she is not permitted to elect to receive part of her pension under one statute and part under another.

Claimant is not entitled, under the facts herein stated, to receive a pension of \$8 per month for her minor child under the Act of May 1, 1926, *supra*.

DEPARTMENT OF JUSTICE,

January 13, 1930.

SIR: I have the honor to acknowledge receipt of your letter of August 12, 1929, transmitting a copy of the opinion of the Solicitor of the Department of the Interior and a memorandum by the members of the Board of Pension Appeals, from which it appears that Priscilla S. Lutz, widow of the late Charles A. Lutz, Major, U. S. Marine Corps, has applied for a pension for herself and her minor child under the age of sixteen years, the issue of her marriage with the deceased officer; that the deceased officer served more than ninety days in the military service of the United States during the war with Spain, and was honorably discharged on November 23, 1898; that in 1905 he became an officer in the Marine Corps and served in that Corps continuously until his death on June 23, 1928, having attained the rank of Major; and that his death was the result of injuries received in line of duty, the result of an aviation accident while employed in actual flying.

It is stated further that:

"His widow became entitled to pension under the general law (Revised Statutes, section 4702, as amended by the Act of August 7, 1882, 22 Stat. 345), at the rate of \$25 per month for herself and, under Revised Statutes, section 4703, \$2 per month for the minor. By reason of the manner in which the officer met his death, and his employment at the time thereof, the widow became entitled under the Act of March 3, 1915 (38 Stat. 940), to double the foregoing rates.

"Because of the officer's service during the war with Spain the widow on his death became entitled under the Act of May 1, 1926 (44 Stat. 382), to pension at the rate of \$30 per month for herself and \$6 per month for the minor.

"She elected to make application under the general law, and filed her application in her own behalf and for the minor child July 24, 1928. On August 7, 1928, at the suggestion of the then Commissioner of Pensions, she filed a supplemental application in behalf of the minor for pension under the Act of May 1, 1926.

"The effect of the application and the supplemental application, considered together, is to apply for pension for

herself at \$50 per month under the general law and double pension law, and \$6 per month for the minor under the Act of May 1, 1926."

You, therefore, submit the following question for my opinion:

"Is the widow of an officer of the Marine Corps whose death occurred by reason of injuries received in line of duty, the result of an aviation accident while employed in actual flying, entitled to receive for the minor child of the officer under 16 years of age only the \$4 per month provided by Revised Statutes, section 4702, as amended by the Act of August 7, 1882 (22 Stat. 345), and as provided by the Act of March 3, 1915 (38 Stat. 940), or is she entitled to receive for the minor child \$6 per month under the Act of May 1, 1926 (44 Stat. 382), she being entitled to pension under that Act, and having filed a supplemental application thereunder in behalf of the minor?"

Sections 4692 and 4693, Revised Statutes (U. S. C. Title 38, secs. 151 and 152), provide for pensions for officers and enlisted men of the Army, Navy, and Marine Corps disabled by reason of any wound or injury received or disease contracted while in the service of the United States and in the line of duty. Section 4702, Revised Statutes (U. S. C. Title 38, sec. 191), provides:

"If any person embraced within the provisions of sections forty-six hundred and ninety-two and forty-six hundred and ninety-three has died since the fourth day of March, eighteen hundred and sixty-one, or hereafter dies by reason of any wound, injury, or disease, which, under the conditions and limitations of such sections, would have entitled him to an invalid pension had he been disabled, his widow, or if there be no widow, or in case of her death, without payment to her of any part of the pension hereinafter mentioned, his child or children, under sixteen years of age, shall be entitled to receive the same pension as the husband or father would have been entitled to had he been totally disabled, to commence from the death of the husband or father, to continue to the widow during her widowhood, and to his child or children until they severally attain the age of sixteen years, and no longer; and, if the

widow remarry, the child or children shall be entitled from the date of remarriage.”

Section 4703, Revised Statutes (U. S. C. Title 38, sec. 193), provides that—

“The pensions of widows shall be increased from and after the twenty-fifth day of July, eighteen hundred and sixty-six at the rate of two dollars per month for each child under the age of sixteen years, of the husband on account of whose death the claim has been, or shall be, granted. And in every case in which the deceased husband has left, or shall leave, no widow, or where his widow has died or married again, or where she has been deprived of her pension under the provisions of the pension-law, the pension granted to such child or children shall be increased to the same amount per month that would be allowed under the foregoing provisions to the widow, if living and entitled to a pension: * * *.”

The Act of March 3, 1915, c. 83, 38 Stat. 940, as amended by Act of August 29, 1916, c. 417, 39 Stat. 556, 585 (U. S. C. Title 38, sec. 231), provides that:

“In all cases where an officer or enlisted man or student flyer of the Navy or Marine Corps dies, or where a student flyer or an enlisted man of the Navy or Marine Corps is disabled by reason of any injury received or disease contracted in line of duty, the result of an aviation accident, received while employed in actual flying in or in handling aircraft, the amount of pension allowed shall be double that authorized to be paid should death or the disability have occurred by reason of an injury received or disease contracted in line of duty not the result of an aviation accident.”

Section 2 of the Act of May 1, 1926, c. 209, 44 Stat. 382 (U. S. C. Title 38, sec. 364a), provides as follows:

“The widow of any officer or enlisted man who served ninety days or more in the Army, Navy, or Marine Corps of the United States during the war with Spain, the Philippine insurrection, or the China relief expedition, between April 21, 1898, and July 4, 1902, inclusive, * * * and was honorably discharged from such service, or, regardless of the length of service, was discharged for or

died in service of a disability incurred in the service in line of duty, such widow having married such soldier, sailor, or marine prior to September 1, 1922, shall, upon due proof of her husband's death, without proving his death to be the result of his Army or Navy service, be placed upon the pension roll at the rate of \$30 a month during her widowhood. * * * and any widow or former widow mentioned in this section shall also be paid \$6 a month for each child under sixteen years of age of such officer or enlisted man, and in case there be no widow or one not entitled to pension under any law granting additional pension to minor children the minor children under sixteen years of age of such officer or enlisted man shall be entitled to the pension herein provided for the widow and in the event of the death or remarriage of the widow or forfeiture of the widow's title to pension the pension shall continue from the date of such death, remarriage, or forfeiture to such child or children of such officer or enlisted man until the age of sixteen years: * * *."

Under either the provisions of sections 4702 and 4703, Revised Statutes, as amended, or the provisions of the Act of May 1, 1926, *supra*, a single pension is provided, the amount of which is, in part, measured by the number of minor children under sixteen years of age. The entire amount of this pension goes to the widow, if there be one entitled, or, if not, to the children until they reach the age of sixteen. In this case the pension goes to the widow, and the additional amount allowed "for" the minor child is granted, not to the child or for the child's use, but to the widow because of the existence of the child. It has been held that the minor child has no right or title thereto, and may not require the widow to account to it therefor. In *Creekbaum v. Sohner*, 1 Ohio N. P. 34, the court, speaking of the "\$2 per month for each child" allowed the widow by section 4703, Revised Statutes, said:

"It seems clear to the Court that the defendant, the widow of John Sohner, properly received this money as her own pension; that she had a right to use it as her own, and the plaintiff has no interest in the money, and no right of action would lie in her behalf for the same."

After the allowance of a pension to the widow, the minor child under the age of sixteen years has a contingent interest only in the pension, its interest being contingent on the remarriage or death of the mother, or the suspension of her pension (see section 4706, Revised Statutes) before the child reaches the age of sixteen years. Upon the happening of the contingency, the child succeeds to the entire pension of the widow, inclusive of the additional allowance made for the child. Sections 4703, 4706, Revised Statutes; Act of May 1, 1926, section 2, *supra*.

It is apparent, therefore, that the pension allowable to the widow, either under sections 4702 and 4703, Revised Statutes, as amended, or under the Act of May 1, 1926, *supra*, including the amount allowable to the widow for each child under sixteen years of age, constitutes one pension under each Act. Each pension is, in my judgment, indivisible. In certain circumstances the widow receives it, and in other circumstances the child receives it, but there is no provision for its payment in part to the widow and in part to the child.

Section 4715, Revised Statutes (U. S. C. Title 38, sec. 25) provides that—

“Nothing in this Title shall be so construed as to allow more than one pension at the same time to the same person, or to persons entitled jointly; but any pensioner who shall so elect may surrender his certificate, and receive, in lieu thereof, a certificate for any other pension to which he would have been entitled had not the surrendered certificate been issued. * * *”

As the widow of Major Lutz is entitled to one pension for herself and her minor child either under the provisions of sections 4702 and 4703, Revised Statutes, as amended, or under the provisions of the Act of May 1, 1926, *supra*, she must, in my judgment, elect the statute under which she will apply. She may not elect to receive a part of her pension under one statute and a part under another. To permit her to do so would be to permit the applicant to receive two pensions in violation of the provisions of section 4715, Revised Statutes, *supra*.

I have the honor to advise you, therefore, that the claimant is not entitled, under the facts stated, to receive a pension

of \$6.00 per month for her minor child under the Act of May 1, 1926, *supra*.

Respectfully,

WILLIAM D. MITCHELL.

To The SECRETARY OF THE INTERIOR.

PENSION CLAIM OF WILLIAM A. SHAW

The right of William A. Shaw to a pension under the Act of June 5, 1920 (41 Stat. 982), on account of service rendered in the Spanish-American War, the Philippine Insurrection, and the China Relief Expedition, and partial disability (disability to earn a support by manual labor), is not affected by reason of his retirement without pay under the Emergency Officers' Retirement Act (45 Stat. 735).

DEPARTMENT OF JUSTICE,

January 13, 1930.

SIR: I have the honor to comply with your request of August 21, 1929, for an opinion upon the question whether one William A. Shaw, who served ninety days or more in the war with Spain, the Philippine Insurrection and the China Relief Expedition, and who was allowed a pension because of such service under the Act of June 5, 1920, 41 Stat. 982, on account of partial disability (inability to earn a support by manual labor), is entitled to continue to draw such pension after having served as an emergency officer in the World War and having been retired without pay under the Emergency Officers' Retirement Act of May 24, 1928, 45 Stat. 735, section 1 of which provides:

" * * * That all persons who have served as officers of the Army, Navy, or Marine Corps of the United States during the World War, other than as officers of the Regular Army, Navy, or Marine Corps, who during such service have incurred physical disability in line of duty, and who have heretofore or may hereafter be rated less than 30 per centum and more than 10 per centum permanent disability by the United States Veterans' Bureau, for disability resulting directly from such war service, shall, from date of receipt of application by the Director of the United States Veterans' Bureau, be placed upon, and thereafter continued

on, the appropriate emergency officers' retired list, created by this Act, with the rank held by them when discharged from their commissioned service, but without retired pay, and shall be entitled only to such compensation and other benefits as are now or may hereafter be provided by law or regulations of the United States Veterans' Bureau, together with all privileges as are now or may hereafter be provided by law or regulations for officers of the Regular Army, Navy, or Marine Corps who have been retired for physical disability incurred in line of duty * * *."

Mr. Shaw served ninety days or more in Company L, Fifth Ohio Infantry, during the war with Spain, the Philippine Insurrection and the China Relief Expedition, and on February 1, 1924, was allowed pension because of such service under the Act of June 5, 1920, *supra*, on account of partial disability (inability to earn a support by manual labor). He served as captain of infantry during the World War from appointment May 11, 1917, to discharge, October 30, 1920. On account of disability incurred in such service he was awarded and received compensation under the War Risk Insurance Act, as amended, 40 Stat. 609, 611, until he was allowed the pension above mentioned. While continuing to receive the pension, he applied for and, on July 10, 1928, was granted retirement without pay under the Emergency Officers Retirement Act, *supra*. On April 26, 1929, the Pension Bureau dropped his name from the pension rolls for the reason that it considered such action as being required by the Act of March 3, 1891, 26 Stat. 1082. On May 21, 1929, Mr. Shaw entered an appeal which is pending with the Secretary of the Interior.

The Act of March 3, 1891, *supra*, provides:

"That hereafter no pension shall be allowed or paid to any officer, non-commissioned officer, or private in the Army, Navy, or Marine Corps of the United States, either on the active or retired list."

When this statute was enacted officers of the Army and Navy were retired on account of physical disability incurred in the line of duty, consecutive years of service, and age. Army officers retired on account of disability incurred in the line of duty received 75 per cent of their active service pay. Naval officers retired after forty-five years service after

reaching the age of sixteen years, or after forty years service, received an amount equal to 75 per cent of the sea pay provided by chapter 8, title 15 Revised Statutes. All other naval officers retired on account of disability incurred in the line of duty, received an amount equal to one-half of the sea pay provided by chapter 8, title 15, Revised Statutes. Sections 1243, 1244, 1251, 1274, 1443, 1444, 1453, 1588, Revised Statutes. Officers of the Marine Corps were retired in the same manner and with the same relative conditions as were provided for the retirement of officers of the Army. Sections 1622-1623, Revised Statutes.

It appears from the foregoing statutes that when the Act of March 3, 1891, was enacted, there was no such thing as retirement without pay, all officers on the retired list being officers retired with pay. Therefore, the latter was the retired list which was the subject of consideration by Congress in that Act.

In *Denby v. Berry*, 263 U. S. 29, 35, the Supreme Court said:

"To be retired from active service under the sections from 1448 to 1455, Rev. Stats., inclusive, means retired with pay and has had this meaning for many years. *Brown v. U. S.*, 113 U. S. 568, 572."

Under the Emergency Officers' Retirement Act emergency officers with ratings of less than 30 per centum and more than 10 per centum permanent disability are retired without pay. Mr. Shaw was retired as one of this class.

In *Estate of Ticknor*, 13 Mich., 44, 52, the Supreme Court of Michigan said:

"* * * Legislatures, like Courts, must be considered as using expressions concerning the thing they have in hand; and it would not be a fair method of intrepertation to apply their words to subjects not within their consideration, and which if thought of, would have been more particularly and carefully disposed of. * * *"

Black, "Interpretation of Laws," Second Edition, p. 78, quotes with approval the above statement of law, and adds, citing *United States v. Saunders*, 22 Wall. 492:

"* * * If it is the evident and plain purpose of the act to affect only a particular class of persons, the generality of the language employed will not have the effect

of including a single individual not belonging to that class, though the mere words might include him. * * *

Applying these rules to the facts in this case, it appears that it would be improper to interpret the term "retired list" as used in the Act of March 3, 1891, so as to include officers retired without pay under the Emergency Officers' Retirement Act, since to do so would be to apply the term "retired list" to a subject not with the consideration of Congress when it enacted the Act of March 3, 1891, and which if considered, would undoubtedly have been more particularly and carefully disposed of.

This conclusion is confirmed by the legislative history of the Act of March 3, 1891, which amended the Act of August 29, 1890, 26 Stat. 371, set forth in the margin,¹ which indicates that the purpose of the Act was to prevent the payment of pensions to officers of the Army, Navy and Marine Corps, retired with pay.

¹ Senator Cockrell, of Missouri, a member of the Senate Committee on Appropriations, was the author of the proviso in the Pension Appropriation Act of August 29, 1890, 26 Stat. 371, providing,

"Hereafter no officer of the Army, Navy, or Marine Corps on the retired list shall draw or receive any pension under any law."

In introducing and explaining to the Senate the necessity for this proviso, the Senator said (Cong. Rec., Vol. 21, Part 9, pp. 8510-8511, Aug. 13, 1890, 51st Cong., 1st Sess.):

"Over three hundred officers of the Army and Navy and Marine Corps on the retired-list, drawing three-fourths of their annual pay, are at the same time drawing pensions!

"Mr. PRESIDENT, the circular-letter from which I have just read was addressed to a retired officer of the Army who is still in the military service of the United States and who is drawing three-fourths of his pay, and that officer returned the circular to this claim agent, stating that he was still in the service on the retired-list, and thereupon this officer received a written letter. The first one is a circular printed letter, sent to everybody whose name could be had, but the reply to the indorsement was a written letter, in which the claim agent says:

"MY DEAR SIR: In reply to your valued favor of the 28th ultimo, being indorsed on inclosure (respectfully returned), I beg to say your drawing pay as a retired officer United States Army will not preclude your drawing a pension under this Act of June 27, 1890.

"I have thoroughly considered this question, and further I can inform you that over three hundred Mexican war officers and soldiers of the United States Army and Navy, retired, are now drawing their regular retired pay and also a pension of \$8 per month under an act just like this act of June 27, 1890, and have been doing so over three years.

"You know the United States Supreme Court have said in the case of United States, appellant vs. General Emory, decided in year 1885 (in relation to the Mexican war), every man of our armies, volunteer or regular, was honorably discharged from serving therein by the treaty of peace or the end of the war; and of course the same thing is true of the late war of the rebellion. Please recollect this in filling up your application, which I beg

It is my opinion, therefore, that William A. Shaw's right to a pension under the Act of June 5, 1920, on account of service rendered in the Spanish-American War, the Philippine Insurrection, and the China Relief Expedition, and partial disability (inability to earn a support by manual labor),

you will execute and send to me, and I will get you a pension under this act of June 27, 1890, if you wish it.

"Yours, very respectfully, etc.

"When I found out the statements made in that letter, I introduced a resolution here calling upon the Secretary of the Interior for a report of the officers of the Army, Navy, and Marine Corps, who, being on the retired-list, had been pensioned, and I shall at the proper time propose an amendment to this bill, providing that hereafter no officer of the Army, Navy, or Marine Corps on the retired-list shall draw or receive any pension under any law. I believed, as probably every member of the Senate and as every member of the House of Representatives believed, that we had effectually precluded retired officers from drawing pensions. That certainly was the general understanding so far as I know, and I supposed we had settled that question; and yet this claim agent tells us that over three hundred retired officers are now drawing pensions and that under the recent law all retired officers can draw pensions. That is not right; that is not just. They get three-fourths of their pay proper and then they get pensions besides. That was not the intention of the pension law at all."

Senator Cockrell was also the author of the Act of March 3, 1891, 26 Stat. 1082, providing,

"That hereafter no pension shall be allowed or paid to any officer, non-commissioned officer, or private in the Army, Navy, or Marine Corps of the United States, either on the active or retired list."

which amended the above quoted proviso in the act of August 29, 1890, *supra*. In introducing and explaining to the Senate the necessity for this amendment, the Senator said (Cong. Rec., Vol. 22, Part 3, pp. 2191-2, Feb. 5, 1891, 51st Cong., 2d Sess.):

"Before the bill is reported to the Senate, I move to insert after the word 'separately,' in line 17, on page 2, the words:

"And provided further, That hereafter no pension shall be allowed or paid to any officer, noncommissioned officer, or private in the Army, Navy, or Marine Corps of the United States, either on the active or retired list."

"The VICE PRESIDENT. The question is on agreeing to the amendment of the Senator from Missouri (Mr. Cockrell)."

"MR. COCKRELL. Mr. President, I think that everyone will admit that the salary we pay the officers of the Army is intended to be in full for all military services. We allow longevity pay and all that, increasing as the service progresses, and it is in lieu of pension and everything else. It has always been understood that, when an officer was placed upon the retired list and received three-fourths of his pay, that was in lieu of compensation for all services performed in the Army, and in lieu of a pension. Also, when we created a retired list for noncommissioned officers and privates, and gave them three-fourths of their pay, longevity pay, and all that, it was understood that that was in lieu of all the military services that they had performed for us, and I know that that must have been the intention of Congress whenever a pension bill has been passed.

"When the Mexican pension bill was passed the Pension Office construed it in a different way, and the first thing we knew there were one hundred and fifty-six officers upon the retired list of the Army drawing pensions under the Mexican war pension law. At the last session of this Congress a proviso

is not affected by reason of his retirement without pay under the Emergency Officers' Retirement Act of May 24, 1928.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE INTERIOR.

was inserted in the pension law prohibiting the payment of pensions to retired officers of the Army. That created a little criticism among retired officers, who said that if retired officers were not allowed to draw pensions the officers on the active list ought not to be allowed to draw pension. In consequence of that information I applied to the Department of the Interior and received in reply a report, which is Senate Executive Document No. 34, Fifty-first Congress, second session, showing six officers on the active list of the Army, Navy, and Marine Corps drawing pensions in addition to their full pay. I also received from the Interior Department a list of noncommissioned officers and privates of the Army, Navy, and Marine Corps on the active and retired lists numbering thirty-two, who were also drawing pensions under the Mexican war pension law.

"This amendment is simply to carry out what we started at the last session—which has always been the understanding of Congress—that officers on the active and retired lists should not draw any pensions."

* * * * *

"Mr. BLAIR. Mr. President, without speaking with reference to those upon the retired list, it seems to me this may well be urged in favor of those who are still upon the active list, who are rendering active service and receiving a pension at the same time. If a man upon the active list were not disabled, of course he would receive no pension, but he would render a certain service, for which he would be entitled to a certain degree of compensation. If that same man in that service has contracted disability from which he suffers and for which he would properly receive a pension if he were not in active service, and yet goes on under these circumstances, suffering from that disability all the time and rendering the same service as though he were not disabled, it does seem to me that he ought to receive his pension as well as his pay."

* * * * *

"So far as the retired soldiers are concerned, they are rendering to the country no service whatever. They are liable to be called into active service under certain conditions, and then their compensation becomes that of those in active service; and I can see why, having retired and rendering no service and yet receiving their two-thirds or three-fourths pay, as the case may be, as retired officers, they should not receive pensions in addition. But, taking the men who being in the active service and yet under disability are doing the same as those who are under none, and doing it under these adverse circumstances of pain, suffering, and expenditure, it seems to me they ought to receive pensions."

"The VICE PRESIDENT. The question is one the amendment of the Senator from Missouri (Mr. Cockrell). Is the demand for the yeas and nays seconded?"

"Mr. HARRIS. I ask that the question may be put again without the yeas and nays."

"The VICE PRESIDENT. The Chair will again put the question on the amendment, if there be no objection."

"The amendment was agreed to."

"The bill was reported to the Senate as amended, and the amendments were concurred in."

"The amendments were ordered to be engrossed and the bill to be read a third time."

"The bill was read the third time, and passed."

PAYMENTS IN LIEU OF TAXES ON REVESTED OREGON AND CALIFORNIA RAILROAD GRANT LANDS

Under the Act of July 13, 1926 (44 Stat. 915), amounts in lieu of taxes should be paid to certain counties in Oregon on account of certain areas of revested Oregon & California Railroad land grants, which were reserved and made parts of national forests by Acts of October 21, 1918 (40 Stat. 1015), and February 11, 1920 (41 Stat. 405).

DEPARTMENT OF JUSTICE,

February 1, 1930.

SIR: I have the honor to comply with your request for my opinion on the question whether amounts in lieu of taxes should be paid certain counties in Oregon under the Act of July 13, 1926, c. 897 (44 Stat. 915), on account of certain areas of revested Oregon & California Railroad land grants which were reserved and made parts of national forests by Acts of Congress of October 21, 1918, c. 192 (40 Stat. 1015), and February 11, 1920, c. 69 (41 Stat. 405).

These tracts were part of the lands granted to the Oregon & California Railroad Company or its predecessors by the Act of July 25, 1866, c. CCXLII (14 Stat. 239), and Acts amendatory thereof. These grants exceeded 3,000,000 acres. Approximately 1,000,000 acres were sold by the Railroad. After litigation (*Oregon & Cal. R. R. v. United States*, 238 U. S. 393), the Act of June 9, 1916, c. 137 (39 Stat. 218), revested in the Government title to the unsold lands aggregating about 2,000,000 acres, and provided for a classification of these lands into three groups—power-site lands, timberlands, and agricultural lands. The Act authorized the sale of the timber on the timberlands, and a disposition of the timberlands and agricultural lands which was expected to yield a monetary return to the Government. Section 10 created a fund into which all moneys received should be paid. From this fund the Government was to reimburse itself eventually for certain sums to be paid to the Railroad and for payments to the counties on account of taxes which had accrued against the railroad when it owned the land. The balance of the moneys in the fund was to be paid to the states and counties in which the lands were situated, and into the Reclamation Fund and general funds

in the Treasury of the United States, in designated proportions. There has never been any such balance.

By the Act of October 21, 1918, c. 192 (40 Stat. 1015), and by action of the Secretary of the Interior and the Secretary of Agriculture under authority of the Act of February 11, 1920, c. 69 (41 Stat. 405), certain tracts were reserved and set aside as a part of the Oregon National Forest, and they have since been under the control and management of the Department of Agriculture.

Your inquiry involves the construction of the Act of July 13, 1926, c. 897 (44 Stat. 915), entitled:

"An Act for the relief of certain counties in the States of Oregon and Washington within whose boundaries the re-vested Oregon and California Railroad Company grant lands are located."

The first section of this Act provides:

"That the Treasurer of the United States * * * shall pay to the several counties * * * out of any money in the Treasury not otherwise appropriated, amounts of money equal to the taxes that would have accrued against said lands for the years 1916 to 1926, inclusive, if the lands had remained privately owned and taxable."

* * * * *

Section 2 contains the following language:

"* * * In computing the amounts so to be paid the Secretary of the Interior shall include all Oregon and California land-grant lands title to which remains in the United States on the 1st day of March of each year."

Section 3 provides:

"On or before the 1st day of October of each year after 1926 the Secretary of the Treasury, upon the order of the Secretary of the Interior, shall pay to the several counties amounts of money equal to the taxes upon said lands within such counties, to be ascertained, computed, and reported in the same manner as for the preceding years, until all charges against said 'Oregon and California land-grant fund' shall have been liquidated and the said fund shows a credit balance as available for distribution under section 10 of the Act approved June 9, 1916."

Section 4 provides:

"All moneys paid under the terms of this Act shall be charged against the said 'Oregon and California land-grant fund,' and all proceeds received from the sale of lands, timber, or otherwise, shall be placed to the credit of such fund until all sums charged against such fund are fully and completely liquidated, and until the United States has been so fully reimbursed no distribution shall be made as provided in section 10 of the said Act approved June 9, 1916."

The situation giving rise to the passage of the Act and its purpose appear in the following language, which occurs both in the Report of the Senate Committee on Public Lands and Surveys, dated June 5, 1926, pp. 4-5, 7 (Report 1009, 69th Congress, 1st Session) and in the Report of the House Committee on the Public Lands, dated May 28, 1926, pp. 4-5, 7 (Report 1330, 69th Congress, 1st Session):

"Congress in the revestment act of 1916, realizing the serious situation that would be created by the act, provided for advancing to the counties the taxes for 1913, 1914, and 1915 from the United States Treasury, totaling about \$1,570,000, since the railroad company, after the beginning of the suits to require it to comply with the terms of the granting acts, had refused to pay the taxes for these years. That is, Congress realizing that so far as the counties were concerned that it had assumed the obligations imposed by the granting acts, provided for the payment of taxes accrued prior to revestment, and proposed thereafter to make a distribution of 25 per cent of the proceeds of the sales of lands and timber (after the payment of certain amounts as stated previously) in lieu of taxes." (Page 5.)

"It was expected by Congress that the lands and timber would find ready market and that sales would be made sufficient in amount not only to pay the preferred claims, as stated above, but to make substantial distributions under the law, and that the counties would duly receive from such distribution moneys substantially equal to the taxes these lands should bear." (Page 4.)

* * * * *

"Unfortunately, however, the result expected has not been realized. Ten years have passed since the revestment act was passed and no returns have been forthcoming. Sales

of lands and timber have brought in less than \$4,000,000, considerably less than is necessary to reimburse the Government for its liability to the railroad company. The time when there will be money for distribution under the terms of the revestment act is, therefore, still in the future.

"The sales under the act have not only failed to secure to the counties; in 10 years there has been nothing paid. The fact that there will be an ultimate settlement will not meet the present crisis and does not help the taxpayer in those counties, who is to-day paying upward of 40 mills in annual taxes. Help for him is now imperative.

* * * * *

"The Congress having, by its act, over objection of the State of Oregon, taken from the State and counties the source of a half million dollars' annual revenue, and having attempted to provide a payment in lieu of the revenue so taken, and the provision so made having proven inadequate, to the detriment of the State and counties, it follows that Congress is obligated, morally at least, to make redress for the injury caused." (Page 7.)

The contention is advanced that Congress could not have intended the Government to pay taxes or money in lieu of taxes, upon tracts which had been taken over by the Government itself as a forest reserve, largely for the purpose of protecting the water supply of certain cities in Oregon, especially in view of the fact that, at least as to the land included in the forest reserve under the Act of 1918, no provision had been made for the sale of this land or the timber thereon. It is true that the Government could not reimburse itself out of such lands for any moneys paid to the counties in lieu of taxes on such lands, whereas the Act of June 9, 1916, expressly provided for disposition of other re-vested lands so as to yield funds from which the Government could obtain reimbursement.

But I do not agree with the contention that these tracts ceased to be "revested Oregon and California Railroad grant lands," within the meaning of the Act of July 13, 1926. I find in none of the statutes mentioned any provision restricting the meaning of these words. Although the Act of June 9, 1916, directed the Secretary of the Interior to

classify all of the revested lands, and contained express provisions for the control and management of lands classified by him as power-site lands, it provided that any of the lands, however classified, might be reclassified. If any power-site tract should be reclassified it might then be subject to a disposition which would yield revenue. The Act of February 11, 1920, expressly authorized the Secretary of Agriculture under certain circumstances to sell timber from that land which is set aside as a part of the Oregon National Forest. The Act of October 21, 1918, contained no such authorization. With this situation existing, Congress passed the Act of July 13, 1926, which gives no indication that it was intended to apply only to such of the revested lands as might produce revenue. This Act includes all revested Oregon and California Railroad Company land-grant lands. It does not except from its terms such of the revested lands as are included in forest reserves. The qualifications are but two: first, the land must be revested land-grant lands, and, second, title must remain in the Government. It contains no provision that the money paid in lieu of taxes on any particular parcel of land shall be charged to the revenue arising from that parcel. If the tracts in question are omitted from the computation, the Secretary of the Interior will not include "all Oregon and California land-grant lands title to which remains in the United States on the 1st day of March of each year," and the Secretary of the Treasury will not pay to the several counties "amounts of money equal to the taxes upon said lands within such counties," as the Act requires.

The legislative history of the Act of July 13, 1926, reveals nothing sufficiently definite to show that the words "all Oregon and California land-grant lands" were intended to be used in a restricted sense. I find in it no reference to the fact that a portion of the revested lands had been set aside as a part of the forest reserve. The only discussion which tends to create any doubt on the matter is the following, which occurs both in the report of the Senate Committee, p. 5, and in the report of the House Committee, p. 5, referred to above:

"The bill does not propose that the Government shall pay the counties any moneys in lieu of taxes on lands publicly held. It does propose, in view of the unforeseen and distressing conditions that have arisen and now exist by reason of the delays in the disposition of the lands and timber contemplated in the revestment act but not realized, that the Government advance now the amount of taxes that would have accrued on the lands for the years 1916-1926, inclusive, had they not been revested, and for subsequent years until the counties have received the 25 per cent coming to them under the revestment act, or until the sales have been made to such an extent that the yearly distribution to the counties practically equals the former taxes collected therefrom. The bill will not give to counties any more money than the reversing [revesting] act provides, but it does make the money available before the sales occur."

The meaning of the first sentence of this passage is uncertain. The amount of money which the revesting Act provided was never determined or even definitely limited, and I regard the quoted passage of the reports as too blind to rely upon. On the other hand, there is the following clear language on page 7 of both reports:

"The measure of the injury suffered by the counties is the amount they would have received in taxes had the revested lands remained on the tax rolls. The bill provides redress for that injury by payment commensurate with that loss. It simply makes the counties whole."

If the tracts in question are not included in the computations, the payment would not be commensurate with the loss, and the counties would not be made whole.

I consequently advise you that in my opinion the question set forth at the beginning of this letter should be answered in the affirmative.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE INTERIOR.

AIR COMMERCE ACT—PUBLICATION OF THE CAUSES OF AIR-
CRAFT ACCIDENTS

The course followed by the Secretary of Commerce in making public the causes of accidents in civil air navigation, with respect both to the manner and time of publication, as herein outlined, has been within the limits of the discretion vested in him and in substantial compliance with the requirements of the Air Commerce Act of 1926 (44 Stat. 568).

DEPARTMENT OF JUSTICE,
February 19, 1930.

SIR: I have the honor to acknowledge receipt of the letter of the Acting Secretary, dated January 13, 1930, in which my opinion is asked on the following question arising in the administration of the Air Commerce Act of 1926 (Act of May 20, 1926, c. 344, 44 Stat. 568, U. S. C., title 49, sections 171-184):

"Whether section 2 of the above-mentioned act requires the Secretary of Commerce to make public the causes of accident in civil air navigation in any other manner than in statistical form, as outlined in the accompanying papers and at such times as he may deem advisable."

Section 2 of the Act reads as follows:

"SEC. 2. PROMOTION OF AIR COMMERCE.—It shall be the duty of the Secretary of Commerce to foster air commerce in accordance with the provisions of this Act, and for such purpose—

"(a) To encourage the establishment of airports, civil airways, and other air navigation facilities.

"(b) To make recommendations to the Secretary of Agriculture as to necessary meteorological service.

"(c) To study the possibilities for the development of air commerce and the aeronautical industry and trade in the United States and to collect and disseminate information relative thereto and also as regards the existing state of the art.

"(d) To advise with the Bureau of Standards and other agencies in the executive branch of the Government in carrying forward such research and development work as tends to create improved air navigation facilities. The Secretary of Commerce is authorized to transfer funds available for carrying out the purposes of this subdivision to any such

agency for carrying forward such research and development work in cooperation with the Department of Commerce.

“(e) To investigate, record, and make public the causes of accidents in civil air navigation in the United States.

“(f) To exchange with foreign governments through existing governmental channels information pertaining to civil air navigation.”

You state that the Department's method of recording and making public the causes of accidents in civil air navigation is shown in “Comparative Statistics and Analyses of Accidents in Civil Aeronautics for the Years 1927, 1928, and the First Six Months of 1929,” a copy of which you enclose. This has, since the date of your letter, been published in Air Commerce Bulletin, Vol. 1, No. 14, pp. 9-14, of January 15, 1930. These published statistics do not disclose the cause of any particular accident, but classify, in tabular form, the causes of all accidents. The method of investigation and the manner of tabulating such causes are thus described in the Air Commerce Bulletin (*ibid.* p. 9):

“The causes of the accidents are divided into four major classifications—personnel, power-plant failures, airplane failures, and miscellaneous. There is a fifth category given over to undetermined and doubtful causes.”

* * * * *

“The accident report is based on the findings of the accident board of the Aeronautics Branch, which is composed of two expert pilots, a flight surgeon, an aeronautical engineer, a lawyer versed in air law, and a statistician. This board investigates and determines the causes of all civil-aircraft accidents; analyzes all accidents reported from the field and reduces them to their causation factors expressed in percentage. The statistics gathered from the work of this accident analysis have proved to be of great value, particularly by pointing to ways and means of decreasing the number of aircraft accidents. They also are of great assistance in the development of certain structural and flying characteristics in aircraft.”

The Air Commerce Act of 1926 is entitled “An Act to encourage and regulate the use of aircraft in commerce, and for other purposes.” It vests broad powers in the Secretary

of Commerce. Among other things, he is given, by section 3, certain regulatory powers with respect to the registration of aircraft, the examination and rating of aircraft, airmen, and air navigation facilities, and the establishment of aircraft rules, and by section 5 authority to designate and establish civil airways and provide for aids to air navigation thereon. The entire Act, and especially section 8, indicates an intention to give the Secretary of Commerce wide discretion in its administration, and this purpose was stated in the report of the Committee on Interstate and Foreign Commerce of the House (Report No. 572, 69th Cong., 1st Sess., House of Representatives) of March 17, 1926, as follows:

“The committee has been mindful of the fact that one of the principal objects to be accomplished by the bill is the encouragement of aviation and it has therefore left wide discretion in the Secretary of Commerce so that individual operators or other agencies should not be unduly hampered by restrictions or regulations until experience might prove them necessary. It has endeavored to leave the field of invention and experiment entirely free and unhampered by Government interference.”

The requirement of subdivision (e) of section 2, here in question, “to investigate, record, and make public the causes of accidents in civil air navigation in the United States,” is phrased in general terms, and manifests the purpose above expressed to leave a broad discretion to the Secretary. It contains no specific directions as to the manner or time of publication. Its declared purpose is “to foster air commerce.” The duties imposed by the other subdivisions of the section, for the same purpose, are phrased in equally general terms. The entire content of the section discloses the intent to leave matters of detail to the discretion of the Secretary of Commerce, subject to the general requirement that the means adopted must be such as to “foster air commerce.”

In an opinion of May 6, 1929, to the Postmaster General (36 Op. 33, 36), I used the following language, which is quite applicable here (p. 36):

“The Act itself does not provide any specific method of obtaining bids. The sole direction in that respect being that—

‘the Postmaster General is hereby authorized to award such contracts to the bidders that he shall find to be the lowest responsible bidders that can satisfactorily perform the service required to the best advantage of the Government.’ This language clearly contemplates competitive bidding, and it is equally clear that it leaves to the Postmaster General a very wide measure of discretion as to the means and methods of securing the bids.”

A similar matter was considered in an opinion by Attorney General Clifford. (4 Op. 585.) The Act of March 3, 1843, c. 100, 5 Stat. 630, 641, appropriated money for the publication of a Documentary History of the American Revolution, and contained this proviso:

“*Provided, also,* That the materials which shall compose each successive volume shall, before any appropriation is hereafter made for the cost of the same, be submitted to, and approved by, the Secretary of State for the time being:”

This proviso did not prescribe the time at which the Secretary was to give his approval, and the Secretary submitted for the opinion of the Attorney General the question whether it was sufficient for him to approve the outline of the materials as they were presented by the contractor for each successive volume. The Secretary was advised that such approval might “be fully justified as a reasonable compliance with the requirements of law.”

These opinions are but expressions of the well-settled principle that, in the absence of specific statutory requirements, incidents of administration lie largely within the discretion of the heads of the several Government departments. See *United States v. Macdaniel*, 7 Pet. 1, 14-15; *United States v. Wright*, 11 Wall. 648; *National Life Ins. Co. of the United States v. National Life Insurance Co.*, 209 U. S. 317; *Central Trust Co. v. Central Trust Co. of Illinois*, 216 U. S. 251.

The statistical method which you have adopted to “make public the causes of accidents in civil air navigation in the United States” seems to be a reasonable compliance with the requirements of the statute, having in mind its expressed purpose “to foster air commerce.” The papers submitted with your letter suggest that the real purpose of demanding

detailed information as to the causes of particular accidents may often be to assist private parties in litigation involving the legal responsibility therefor. The publication of such information might make it difficult for the Department to secure frank disclosures from those concerned in particular accidents and might thus hamper the Department in securing accurate information upon which to base remedial measures for the future. These considerations suggest a possible reason for Congress not requiring any particular method for making public the causes of accidents.

The time of publication is not specified at all in the Act, and is thus left largely to your discretion. Of course, the intervals must not be so infrequent as to negative substantial compliance with the statutory requirement of publication. I understand, however, that your practice has been to publish statistical material of the sort above described at approximately six months intervals.

I am of the opinion that the course which you have followed, with respect both to the manner and time of publication, has been within the limits of your discretion under the statute and in substantial compliance with its requirements.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF COMMERCE.

**AUTHORITY OF PRESIDENT TO DROP AN OFFICER FROM
THE ROLLS OF THE NAVY**

One A. E. Tangren, a chief machinist in the U. S. Navy, was convicted by a Federal court of certain offenses against the United States and was sentenced to pay a fine of \$1,000 and be imprisoned in a Federal penitentiary for a period of 18 months. The execution of his sentence of imprisonment was suspended under the Probation Act of March 4, 1925 (43 Stat. 1259), and he took no steps during the term at which his sentence was imposed to alter or set it aside. *Held* that the said Tangren has been "finally sentenced to confinement in a * * * Federal penitentiary" within the meaning of the Act of April 2, 1918 (40 Stat. 501), and consequently may be dropped from the rolls of the Navy by the President.

DEPARTMENT OF JUSTICE,

March 4, 1930.

SIR: I have the honor to comply with your request of September 9, 1929, for my opinion upon the question

whether one A. E. Tangren, a Chief Machinist in the U. S. Navy, can be dropped from the rolls of the Navy by authority of the President, under the Act of April 2, 1918, c. 39, 40 Stat. 501 (U. S. C., title 34, sec. 1200, art. 36), which provides:

"That the President is hereby authorized to drop from the rolls of the Navy or Marine Corps any officer thereof who is absent from duty without leave for a period of three months or more, or who, having been found guilty by the civil authorities of any offense, is finally sentenced to confinement in a State or Federal penitentiary: *Provided*, That no officer so dropped shall be eligible for reappointment."

You state that in July, 1929, Tangren was convicted by the United States District Court for the Southern District of California of certain offenses against the United States, and sentenced as follows:

"\$1,000 fine and stand committed to San Diego County Jail until paid or until discharged therefrom by due process of law, and be imprisoned in the United States penitentiary to be designated, for the term and period of 18 months; imprisonment in said penitentiary to be suspended for a period of two years on condition that the partnership between A. E. Tangren and E. C. Koehler be immediately dissolved, and that as long as defendant Tangren is an officer of the United States Navy, he must not engage in private business."

Tangren did not appeal from this judgment; no proceeding was begun during the term at which it was rendered to alter or set it aside, and the term has now expired.

The question is whether Tangren has been "finally sentenced to confinement in a * * * Federal penitentiary," within the meaning of the Act of April 2, 1918, *supra*. Execution of his sentence, in so far as it prescribed such confinement, was suspended under the Probation Act of March 4, 1925, c. 521, 43 Stat. 1259 (U. S. C., title 18, secs. 724, 725). That Act, so far as here pertinent, provides that the courts shall have—

"* * * power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as

they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: * * *

* * * * *

“SEC. 2. * * *

“At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.”

The form of the sentence and the provisions of the Probation Act raise two questions: (1) whether Tangren has been “sentenced to confinement” in a penitentiary, and (2) whether, in view of the language of section 2, he has been “finally sentenced” to such confinement.

With respect to the first question, it may be suggested that the imposition of sentence and the suspension of execution thereof were simultaneous acts, and that the effect of the entire action of the court was not to sentence Tangren to confinement in the penitentiary.

The solution of the question, however, ultimately depends upon the construction of the Act of April 2, 1918, and what test Congress intended to lay down as the basis of authority to drop an officer from the rolls of the Navy.

The purpose of that Act was not to impose additional punishment upon naval officers convicted of crime, but rather to promote the efficiency of the Navy and to maintain the high standard of its officer personnel by providing that officers who fail to maintain a certain standard of conduct may be dropped from the rolls and rendered ineligible for reappointment. By the statute, being convicted and “finally sentenced to confinement in a * * * Federal penitentiary” is fixed as a criterion of unfitness.

These words do not, taken literally, require incarceration, and that it was not the intent of Congress to establish such a test is made clearer by the language of the title of the statute: “An Act to authorize the President to drop from

the rolls any naval or Marine Corps officer absent without leave for three months, or who has been convicted of any offense punishable by confinement in the penitentiary by the civil authorities, and prohibiting such officer's reappointment." While the body of the Act is not susceptible of a construction that only conviction of an offense which the law makes "punishable" by confinement in the penitentiary is required, the use of the word "punishable" in the title is persuasive that no stricter test was intended by the body than its literal text imports. The prescribed criterion relates to the gravity of the offense. The test is the commission of an offense sufficiently serious that confinement in a penitentiary is not only authorized by the law as punishment therefor but is also regarded by the court as an appropriate punishment in the particular case.

The question, however, whether sentence will be suspended and probation granted depends not so much upon the gravity of the offense as upon reasons personal to the individual offender. The purpose of the Probation Act, as stated in *United States v. Murray*, 275 U. S. 347, 357-358, was to provide

" * * * an amelioration of the sentence by delaying actual execution or providing a suspension so that the stigma might be withheld and an opportunity for reform and repentance be granted before actual imprisonment should stain the life of the convict. * * *

"The great desideratum was the giving to young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment. * * * Probation is the attempted saving of a man who has taken one wrong step and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence. * * *

Such action as the court might take in suspending execution of the sentence, in order to accomplish the humane purposes of the Probation Act, can not eradicate the fact of unfitness, as defined by the statute of April 2, 1918, which has been established by Tangren's conviction and his sentence. (*Cf.* 31 Op. 225.)

It has been held that the action of the court in suspending execution of sentence is distinct and separable from the sentence itself. In *United States v. Gargano*, 25 F. (2d) 723, 724, the Court said:

" * * * The sentence is imposed according to the penal statute under which the conviction is had, and is a judicial function flowing directly from the statute under which the criminal proceeding is brought; whereas the duties imposed by the Probation Act are of rather an auxiliary or ancillary character, sui generis in nature. These constitute a judicial function only by virtue of the legislative authority which Congress vested separately in the court, and which might well have been vested in some executive officer, board, bureau, or commission. * * *"

See also *Ex Parte United States*, 242 U. S. 27, 39-42; *Ackerson v. United States*, 15 F. (2d) 268, 270. The cases construing various State probation Acts, predecessors of the national Probation Act, *supra* (see *United States v. Murray*, 275 U. S. 347, 355; *Ackerson v. United States*, *supra*, p. 269), likewise adopt the view that the suspension of execution of sentence or grant of probation are acts separate and distinct from the judgment or sentence of the court and can not be regarded as being part of such judgment or sentence. *State v. Drew*, 75 N. H. 402, 403; *Belden v. Hugo*, 88 Conn. 500; *King v. Commonwealth*, 246 Mass. 57; *In re Hall*, 100 Vt. 197.

Tangren's sentence expressly specified imprisonment in "the United States penitentiary to be designated, for a term and period of 18 months." For the above reasons, I do not think that the fact that execution of that sentence was suspended makes it less a sentence "to confinement in a * * * Federal penitentiary" within the meaning and intent of the Act of April 2, 1918.

The question whether he has been "finally sentenced" to such confinement remains.

In criminal law the sentence pronounced by the court is the final judgment. *United States v. Lecato*, 29 F. (2d) 694; *People v. Scott*, 326 Ill. 327; *People v. Fisher*, 237 Mich. 504. Until sentence is pronounced there is no final judgment from which an appeal may be taken. *United States v. Lecato*, *supra*; *Commonwealth v. Carver*, 224 Mass. 42; *Hill*

v. People, 10 N. Y. 463; *State v. Vaughan*, 71 Conn. 457; *State v. Bongiorno*, 96 N. J. L. 318. After sentence has been imposed, even though its execution has been suspended, it is still a final judgment from which appeal must be taken in apt time in order to preserve the defendant's rights thereto. *Sutton v. State*, 194 Ind. 479; *Mariano v. Hibbard*, 243 Mass. 90.

Since Tangren did not appeal from the judgment and took no steps during the term at which sentence was imposed to alter or set it aside, the court, apart from statutory provision to the contrary, has now no power to modify its final judgment. *United States v. Mayer*, 235 U. S. 55, 67.

The only doubt as to the conclusion that Tangren has been "finally sentenced" to confinement in a Federal penitentiary is created by the provision of section 2 of the Probation Act that the court, at "any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced," may revoke the "suspension of sentence" and "impose any sentence which might originally have been imposed." It may be suggested that this provision authorizes the court, although the judgment term has expired, to change its judgment, so that Tangren may not be regarded as having been "finally sentenced" to confinement in a penitentiary.

The Probation Act empowers the court to suspend either the execution of sentence or the imposition of sentence. Where imposition of sentence is suspended and probation granted, and the probation and suspension are later revoked, the case reverts to its status at the time probation was granted, and imposition of sentence is necessary before the offender can be imprisoned. Where, however, a sentence has been once imposed and only execution suspended, and the suspension of execution is revoked, the original sentence then becomes operative and may be enforced. In view of the general rules as to the finality of sentences after the expiration of the judgment term, there is strong ground for the view that the power given in section 2 to sentence probationers to "any sentence which might originally have been imposed" was intended to apply only in cases where imposition of sentence was originally suspended and the sus-

pension of such imposition later revoked. Where a sentence appropriate to the offense has once been imposed and only its execution suspended, there is no apparent reason why, upon revocation of that suspension, the court should be authorized to impose "any sentence which might originally have been imposed," unless Congress intended to authorize the court to change its original sentence. If it had been the intention to create such an important power, it would seem that more explicit language would have been used.

Apart from statute, an order suspending execution of a sentence can not be regarded as altering the sentence or setting it aside. *United States v. Pile*, 130 U. S. 280. And the suspension of execution of sentence under the Probation Act should be regarded not as changing the original sentence or final judgment of the court, but merely as relieving the defendant from the execution thereof, subject to later revocation of the suspension within the time limits specified by the Act. If this view is correct, then, when a sentence has been once imposed and execution suspended, the court is not empowered by the Act, upon revocation of the suspension of execution, to impose a new sentence in lieu of that originally imposed. Although this point has never been squarely presented, the above view finds some support in the opinions in most of the cases in which the Probation Act has been construed. *United States v. Felder*, 13 F. (2d) 527; *Archer v. Snook*, 10 F. (2d) 567, 569; *United States v. Gargano*, 25 F. (2d) 723; *Ackerson v. United States*, 15 F. (2d) 268; *United States v. Young*, 17 F. (2d) 129, 133; *Kriebel v. United States*, 10 F. (2d) 762, 764. But cf. *Nix v. James*, 7 F. (2d) 590, 592; *Kaplan v. Hecht*, 24 F. (2d) 664.

It is not necessary, however, to predicate the conclusion reached herein wholly upon the view as to the construction of section 2 of the Probation Act above expressed. When the Act of April 2, 1918, was passed there was no Federal probation statute in existence. More than a year previously it had been decided that the United States courts were without power, apart from statutory authority, to suspend indefinitely the execution of a sentence, the effect of such suspension being the permanent refusal to enforce the sentence. *Ex Parte United States*, 242 U. S. 27. It is manifest, therefore, that when Congress used the words "finally

sentenced to confinement in a * * * Federal penitentiary" in the Act of April 2, 1918, it did not have in contemplation such action as the courts may now take under the Probation Act in suspending the execution of a sentence to imprisonment. Even if it were assumed that section 2 of the Probation Act empowers the court to change its sentence after the expiration of the term at which it was imposed, it would not be necessary to conclude that the granting of such a new power would affect the requirements for dismissal from the Navy as fixed by the Act of April 2, 1918, or change the meaning of the language of that statute as understood at the time of its enactment.

The words "finally sentenced," as used in that Act, seem to me to mean that, before the fact of unfitness required as the basis of dismissal from service is established, the officer should have the opportunity of exhausting all remedies by appeal or otherwise which might be available to alter or set aside the final judgment of the court. This opportunity was available to Tangren until the expiration of his time to appeal and of the term at which he was sentenced.

It is my opinion, therefore, that A. E. Tangren has been "finally sentenced to confinement in a * * * Federal penitentiary" and consequently may be dropped from the rolls of the Navy by the President, under the authority of the Act of April 2, 1918, *supra*.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE NAVY.

OFFENSES COMMITTED UNDER SECTION 504, WORLD WAR
VETERANS' ACT—EFFECT OF PARDON

One Leroy Damron pleaded guilty in a Federal court "to making a false and fraudulent statement concerning his claim as a vocational trainee," under section 504 of the World War Veterans' Act, as amended. Upon his conviction, sentence was suspended and he was placed on probation. Subsequently the President granted him "a full and unconditional pardon for the purpose of releasing him from probation and restoring his civil rights." *Held* that the pardon of Damron by the President restored him, as of the date of the pardon, to the rights to which he was entitled under Titles II and IV of the World War Veterans' Act, as amended, prior to the commission of his offense.

DEPARTMENT OF JUSTICE,

March 17, 1930.

SIR: I have the honor to refer to your letter of December 7, 1929, from which it appears that one Leroy Damron pleaded guilty in the United States District Court for the Southern District of California, "to making a false and fraudulent statement concerning his claim as a vocational trainee," under section 504 of the World War Veterans' Act, 43 Stat. 607, 629, as amended by the Act of March 4, 1925, 43 Stat. 1302, 1312 (U. S. C., Title 38, sec. 555). Upon Damron's conviction sentence was suspended and he was placed on probation. Subsequently, on April 23, 1929, the President of the United States granted him "a full and unconditional pardon for the purpose of releasing him from probation and restoring his civil rights."

It appears that by committing the offense described Damron forfeited, under section 504 of the World War Veterans' Act, as amended, *supra*, all right to compensation and other benefits under Titles II and IV of that Act. You request my opinion as to whether the pardon of the President restores Damron's right to such compensation and other benefits.

Section 504, *supra*, provides:

"Any person who shall knowingly make or cause to be made, or conspire, combine, aid, or assist in, agree to, arrange for, or in any wise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, or writing purporting to be such, concerning any claim or the approval of any claim for compensation or maintenance and support allowance, or the payment of any money for himself or for any other person, under Titles II or IV hereof, shall forfeit all rights, claims, and benefits under said titles, and, in addition to any and all other penalties imposed by law, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than \$1,000 or imprisonment for not more than one year, or by both such fine and imprisonment, for each such offense."

Section 504 is found in Title V of the World War Veterans' Act, entitled "Penalties," 43 Stat. 607, 629 The

plain purpose of the section, as indicated by its language, was to impose a penalty for the commission of the offense described. The penalty included not only the forfeiture of rights under Titles II and IV of the Act, but also, upon conviction of the offense, punishment by fine or imprisonment.

The pardon clause of the Constitution, Article II, section 2, provides that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

Referring to this clause in *Ex parte Garland*, 4 Wall. 333, 380-381, the Supreme Court said:

"The power thus conferred is unlimited, with the exception stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him can not be fettered by any legislative restrictions.

"Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. * * *

"There is only this limitation to its operation: It does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment."

In *Knote v. United States*, 95 U. S. 149, 153-154, the Supreme Court said:

"* * * A pardon is an act of grace by which an offender is released from the consequences of his offence, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the

offence, and restores to him all his civil rights. In contemplation of law, it so far blots out the offence, that afterwards it can not be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position. But it does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to give it. The offence being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required. * * *

See also *Ex parte Grossman*, 267 U. S. 87, 120.

It is further held that the constitutional grant of authority to pardon offenses carries with it the "power to release penalties and forfeitures which accrue from the offenses." *Osborn v. United States*, 91 U. S. 474, 478; *Illinois Central R. Co. v. Bosworth*, 133 U. S. 100.

The principles above set forth govern and answer the question submitted. The forfeiture of Damron's rights under Titles II and IV of the Act and his conviction were both based upon the one offense of "making a false and fraudulent statement concerning his claim as a vocational trainee." The offense committed, a violation of a law of the United States, was clearly one against the United States. See *Ex parte Grossman*, 267, U. S. 87, 115. Accordingly the full and unconditional pardon of the President remitted all penalties consequent upon the commission of the offense, including not only the punishment incident to the conviction but also the forfeiture.

It is my opinion, therefore, that the pardon of Damron by the President restored him, as of the date of the pardon, to the rights to which he was entitled under Titles II and IV of the World War Veterans' Act, as amended, *supra*, prior to the commission of his offense.

Respectfully,

WILLIAM D. MITCHELL,

TO DIRECTOR, UNITED STATES VETERANS' BUREAU.

CITIZENSHIP OF R. BRYAN OWEN

One R. Bryan Owen, whose mother was originally a citizen of the United States and whose father was a British subject, was born in England on April 14, 1913, and came to the United States with his parents in 1919, where he has continuously resided ever since. His mother became naturalized in 1925, and his father, who was never naturalized, died in 1927. *Held* that, if the said R. Bryan Owen did not acquire a citizenship status at the time of his mother's naturalization, there can be no doubt that he is now a citizen of the United States by reason of his father's death and the other existing conditions herein specifically mentioned, in accordance with the unequivocal terms of section 5 of the Act of March 2, 1907 (34 Stat. 1229).

DEPARTMENT OF JUSTICE,

October 8, 1929.

SIR: I have the honor to acknowledge the letter of your predecessor of November 19, 1928, in which it is stated that—

“Mr. R. Bryan Owen, a student at Staunton Military Academy, Staunton, Virginia, has requested enrollment in the Reserve Officers' Training Corps at that institution. Under section 44 of the Act of June 3, 1916 (39 Stat. 192; U. S. C., Title 10, sec. 382), it is necessary, in order that his request may be granted that he be a citizen of the United States. His citizenship, however, is in doubt.”

Thereupon, my opinion is requested as to the citizenship of R. Bryan Owen, the facts pertaining to which, I am advised, are as follows:

“Mr. Owen's parents were married May 3, 1910. His mother was originally a citizen of the United States, and his father was a British subject. The parents, after the marriage, went to England, where Mr. Owen was born on April 14, 1913. His parents, together with their son, came to the United States in 1919, and took up a residence in Florida, where Mr. R. Bryan Owen has continuously resided ever since. His mother became naturalized in 1925. His father was never naturalized, but died in 1927.”

Section 3 of the Act of March 2, 1907 (34 Stat. 1228), which was in force at the time of the marriage of the

NOTE.—The publication of this opinion was temporarily withheld.

parents and up to the time of their return to the United States with their son in 1919, provided:

"That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."

The Act of September 22, 1922, commonly known as the Cable Act (42 Stat. 1022; U. S. C., Title 8, secs. 9 and 369) provides in part as follows:

"SEC. 3. That a woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after the passage of this Act, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens: *Provided*, That any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States. If at the termination of the marital status she is a citizen of the United States she shall retain her citizenship regardless of her residence. * * *

"SEC. 4. That a woman who, before the passage of this Act, has lost her United States citizenship by reason of her marriage to an alien eligible for citizenship, may be naturalized as provided by section 2 of this Act: * * *

"SEC. 7. That section 3 of the Expatriation Act of 1907 is repealed. Such repeal shall not restore citizenship lost under such section nor terminate citizenship resumed under such section. * * *"

Section 2172 of the Revised Statutes (U. S. C., Title 8, Sec. 7) provides that—

"The children of persons who have been duly naturalized under any law of the United States, * * * being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdic-

tion of the United States be considered as citizens thereof; * * *

By section 5 of the above-mentioned Act of 1907 (U. S. C., Title 8, sec. 8) it is provided:

"That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: *Provided*, That such naturalization or resumption takes place during the minority of such child: *And provided further*, That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States."

Section 1994 of the Revised Statutes, which was also repealed by the Act of 1922, provided:

"Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

Prior to the Act of 1922 it had been authoritatively established under the provisions of the Act of February 10, 1855 (10 Stat. 604), which were carried into the Revision of 1878 as section 1994, that whenever an alien woman, unless she was of a race which would preclude her naturalization, "is in a state of marriage to a citizen, whether his citizenship existed at the passage of the Act or subsequently, or before or after the marriage, she becomes, by that fact, a citizen also." (*Kelly v. Owen*, 7 Wall. 496.) Consequently, by virtue of the two last-quoted sections, the naturalization of the husband and father conferred citizenship upon the wife, and upon minor children "if dwelling in the United States."

There had been uncertainty as to whether, under section 2172, the child had to reside in the United States at the time of the naturalization of the parent, or whether there was a compliance with the statute by his coming to the United States during minority. (*Kaplan v. Tod*, 267 U. S. 228, 230; *United States ex rel. Patton v. Tod*, 297 Fed. (C. C. A.) 385; *United States v. Rodgers*, 185 Fed. (C. C. A.) 334; *United States v. Tod*, 3 F. (2d) 836, 838; *Van Dyne on Naturalization*, p. 219; Cong. Doc. 5175 (House Doc. 326), 59th Cong., 2d Sess.)

It has been repeatedly held, both before the enactment of 1907 and since the repeal of section 3 of that Act, that where the father is not living, or where the marital relation has been otherwise terminated and the mother has custody of the minor child, the latter becomes a citizen through the naturalization of the mother. (*In re Lazarus*, 24 F. (2d) 243; *Petition of Drysdale*, 20 F. (2d) 957, and cases there cited; *Roa v. Collector of Customs*, 23 Philippine Reports 315, 341; *Brown v. Shilling*, 9 Md. 74.) Speaking in respect of section 2172, *Van Dyne on Citizenship*, says (p. 118):

"The naturalization of an alien woman, a widow, confers citizenship upon her minor son, under this section.

"When a woman, by the death of her husband, becomes the head of the family, her naturalization should carry with it the same consequences, as regards the children, as would have attended that of the father had he been living. (*Cockburn, Nationality*, p. 213.)"

The last-mentioned authorities plainly negative the idea that minor children acquire a citizenship status by reason of the naturalization of the mother during the lifetime of the father and while the family is living together, and I am aware of no instance where a court has so held. In this connection, attention is called to section 1993 of the Revised Statutes, which is as follows:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof are declared to be citizens of the United States; * * *

The child of a citizen father and an alien mother is a citizen, but one born of an alien father and a citizen mother is not a citizen by virtue of parentage. (11 C. J. 780; *Borchard's Diplomatic Protection of Citizens Abroad*, p. 612.)

In the light of the last-quoted statute it could hardly be seriously questioned that a child born abroad since the enactment of 1922 of an American mother and an alien father would be an alien. This situation is, to my mind, analogous to that of a minor child born abroad of alien parents, whose mother has been, in pursuance of the Act

of 1922, naturalized during the life of her alien husband and while the marital status was unimpaired, which is the case we have here. (*In re Page*, 12 F. (2d) 135; *Doyle v. Town of Diana*, 203 App. Div. 239, 241; *Campbell v. Wallace*, 12 N. H. 362, 371; *Ludlam v. Ludlam et al.*, 26 N. Y. 356; *Davis v. Hall*, 1 Nott & McCord's Reports (S. C.) 292; *Moore's International Law Digest*, Vol. III, p. 476.)

The Report of the House Committee on the bill which was subsequently enacted September 22, 1922 (Cong. Doc. 7957, 67th Cong. 2d Sess. (H. R. 1110), contains the following statement:

"This bill in nowise affects the status of children. Those born here are citizens of the United States, under the Constitution, regardless of the allegiance of their parents. Those born abroad will, as heretofore, take the nationality of their fathers."

Of like import is the debate on the bill (Cong. Rec., 67th Cong., 2d sess., Vol. 62, Pt. 9, pp. 9044, 9057). See also *In re Citizenship Status of Minor Children Where Mother Alone Becomes Citizen Through Naturalization*, 25 F. (2d) 210.

The Act of 1922 entitled, "An Act Relative to the naturalization and citizenship of married women," like section 3 of the Act of 1907 which it repealed, is silent upon the subject of the citizenship of minor children, with respect to which Congress saw fit to continue in force section 5 of the Act of 1907. The provision in section 3 of the last-mentioned Act, in pursuance of which a woman "at the termination of the marital relation" might resume her American citizenship simply "by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein," has been superseded by a short form of naturalization without regard to the marital status, as provided by sections 2 and 4 of the Act of 1922. (U. S. C., Title 8, secs. 368, 369.)

Unless it be in respect of whether, in the circumstances of this case, the acquisition of citizenship by the minor occurred immediately upon the resumption of citizenship by the mother or not until the death of the father, section 5 is

explicit and free from ambiguity. In either of the alternatives mentioned it appears that the conditions specified in section 5 are present in the case of this young man. He was born without the United States of alien parents, and he is residing here permanently, while yet a minor, with his mother, his only surviving parent, who has resumed her American citizenship.

Assuming that R. Bryan Owen did not acquire citizenship at the time his mother was naturalized, it is difficult to see how the fact that he was then in the United States affects in any manner his present citizenship status. To say that he is any the less a citizen than he would be had he come to the United States subsequent to his father's death, is to read into the statute a condition wholly unwarranted by its terms. Upon the conditions therein prescribed, section 5 provides that a minor child shall be deemed a citizen of the United States. (*In re Lazarus, supra.*)

Commenting on section 5, *Van Dyne on Naturalization*, page 219, makes the following statement:

"By the terms of this law, naturalization of the parent confers citizenship on the foreign-born minor child if the latter is permanently residing in this country at the time of the parent's naturalization, or subsequently to such naturalization, during the minority of the child."

It is well recognized doctrine that "the right of aliens to acquire naturalization is purely statutory." (*Zartarian v. Billings*, 204 U. S. 170; *United States v. Rodgers, supra.*)

In *United States v. Tod*, 3 F. (2d) 836, adverting to the above case of *United States v. Rodgers*, the court said (p. 838):

"It is there held that section 5 of the Act of March 2, 1907, though not in the form of an amendment or repealing act, was passed for the purpose of removing the ambiguity in the word 'dwelling' in section 2172, the language being changed in section 5 of the Act of March 2, 1907 (Comp. St. § 3962), to read 'The citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States.'

* * * * *

"No case has been cited by the relator, and none has been found, holding that, since the Act of March 2, 1907, section 2172, Rev. St., has any application to minor aliens born outside of the United States coming to the United States and claiming citizenship by naturalization of the parent."

While the considerations herein suggested seem persuasive, if not conclusive, against the view that R. Bryan Owen acquired citizenship at the time his mother resumed her American citizenship, your inquiry does not require that point to be passed upon categorically. It is therefore deemed sufficient to say that if R. Bryan Owen did not acquire a citizenship status at the time of his mother's naturalization, there can be, in my opinion, no doubt that he is now a citizen of the United States by reason of his father's death and the other existing conditions hereinbefore specifically mentioned, in accordance with the unequivocal terms of section 5 of the Act of 1907.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF WAR.

FEDERAL PROJECT FOR WATERWAY FROM UTICA, ILLINOIS,
TO LAKE MICHIGAN

Respecting the adoption of a proposed Federal project for a waterway from Utica, Illinois, to Lake Michigan, including the Illinois State Waterway, in advance of an amendment to the constitution of the State of Illinois, and formal transfer of title by the State of Illinois to the United States, *held*:

First: That in dealing with this problem and having in mind the fact that the Illinois constitution may never be amended, and that no State officers may ever be authorized to relinquish this waterway to the United States, we must assume that the powers of the United States are limited to those which it may exercise under the Constitution without the consent of the State.

Second: That with respect to those parts of the waterway under consideration which are navigable streams improved by the State, the powers of Congress are plenary, and without any amendment to the constitution of Illinois or any permission from the State, the United States, under appropriate Acts of Congress, may take complete control over the improvement of navigation and its regulation and provide for and insure to the public perpetual, free navigation.

Third: That as to those parts of the waterway which are entirely artificial, Congress may provide for improvement and control of navigation and for the regulation and control thereof, so as to insure to the public the right of navigation, and to take such action as may be necessary to prevent interference with or obstruction to navigation, but probably subject to the qualification that without the consent of the State it can not be deprived of reasonable compensation for the use of its property.

DEPARTMENT OF JUSTICE,

April 1, 1930.

SIR: I have the honor to comply with the request contained in your letter of March 6, 1930, for my opinion upon the question stated by the Secretary of War in his letter of February 6, 1930, as follows:

“Whether, upon the adoption of a Federal project for a waterway from Utica, Illinois, to Lake Michigan, including the Illinois State Waterway, in advance of an amendment of the constitution of the State of Illinois and formal transfer of title by the State of Illinois to the United States, the said waterway from Utica to Lake Michigan, including the structures pertaining thereto, would be subject to the complete control of the United States and to the Federal laws for the protection and preservation of navigable waters, and whether the public would be assured of the perpetual right of free navigation thereof.”

The Secretary's letter states that, at the request of a committee of Congress, the War Department is engaged in a review of the reports submitted in House Document No. 112 and House Document No. 220, Fifty-sixth Congress, second session, with a view to the extension of free navigation with a nine-foot channel from Utica, Illinois, to Lake Michigan, which would link up the Mississippi waterway system with the Great Lakes. Such extension contemplates the use of improvements on the upper Illinois River and the Des Plaines River, constructed or being constructed by the State of Illinois, and commonly referred to as the Illinois State Waterway, and certain drainage canals constructed by the Sanitary District of Chicago, which is an independent, overlying political subdivision of the State, including the whole of the city of Chicago and forty-nine other cities and villages of the State of Illinois. The situation which gives rise to

the proposed project, as appears from the Secretary's letter, and the papers submitted by him, may be summarized as follows:

The so-called Illinois waterway extends between Lockport, which is the point of junction of the Des Plaines River with the main drainage canal of the Sanitary District of Chicago, and a point on the Illinois River near Utica, Illinois, which is the head of the existing United States improvement on that river. It was provided for by Act of the General Assembly of Illinois approved June 17, 1919 (Illinois Laws 1919, p. 977), which was enacted pursuant to an amendment to the constitution of the State, adopted in 1908, hereafter quoted, authorizing the issue of \$20,000,000 of bonds for the construction of a deep waterway or canal between those points. This State project involves dredging and the construction of dams and large locks in the navigable Illinois and Des Plaines Rivers, also the construction of two short marginal canals and a large lock connecting with the main drainage canal at Lockport. At least two of the locks are built on land at some distance from any large navigable waters.

The plans of the Department of Public Works and Buildings of the State of Illinois for this waterway were submitted to the Secretary of War pursuant to sections 9 and 10 of the Act of March 3, 1899 (30 Stat. 1151; U. S. C., Title 33, sections 401, 403), and approved by permit of the Secretary of War dated March 6, 1920, as modified by order of the Secretary dated April 2, 1923.

Between Lockport and Lake Michigan the contemplated route would utilize the main drainage canal constructed by the Sanitary District of Chicago upon a right of way purchased by it, from the west fork of the Chicago River to Lockport, and another canal, known as the Calumet Sag Channel, also constructed by it, connecting the main drainage canal with the Little Calumet River and thence with Lake Michigan. These canals were constructed primarily for sanitary purposes, but their use for navigation was contemplated, and they were provided with movable bridges and with small locks in the dam at Lockport and at the head of the Calumet Sag Channel. The district has also

made navigation improvements in the south fork and west fork of the Chicago River, connecting this canal with the United States navigation project in the Chicago River, and also in the portions of the Little Calumet and Calumet rivers connecting the Calumet Sag Channel with the United States improvements in the latter streams.

The Secretary states that the completion of the Illinois waterway project, in connection with the canals of the Sanitary District and with certain United States projects, would open the way for the movement of water-borne commerce between the Great Lakes and the Mississippi River. This project has not as yet, however, received congressional authorization.

The Illinois waterway has not as yet been completed, and the unexpended balance of the proceeds of the bond issue authorized by the constitutional amendment of 1908 is less by several millions of dollars than the estimated cost of completion. The Secretary is informed that under the constitution of Illinois the State can not expend any money on the waterway in excess of the authorized \$20,000,000 without a constitutional amendment, necessitating a referendum, which could probably not be secured for at least three years. It has therefore been proposed that the United States enter upon the uncompleted section of the Illinois waterway and expend Government funds to complete it.

The land on which the Illinois waterway is located is owned by the State of Illinois, and that State is prohibited by the constitutional amendment of 1908, above referred to, from selling or leasing any canal or waterway owned by it without the approval of the people expressed in a referendum, which the Secretary is informed could not be had for at least three years. That provision of the constitution (separate section 3) is as follows:

“The Illinois and Michigan Canal, or other canal or waterway owned by the State shall never be sold or leased until the specific proposition for the sale or lease thereof shall first have been submitted to a vote of the people of the State at a general election, and have been approved by a majority of all the votes polled at such election. The General Assembly shall never loan the credit of the State

or make appropriations from the treasury thereof, in aid of railroads or canals:

“Provided, That any surplus earnings of any canal, waterway or water power, may be appropriated or pledged for its enlargement, maintenance or extension; and,

“Provided, further, that the General Assembly may, by suitable legislation, provide for the construction of a deep waterway or canal from the present water power plant of the Sanitary District of Chicago, at or near Lockport, in the township of Lockport, in the county of Will, to a point in the Illinois River at or near Utica, which may be practical for a general plan and scheme of deep waterway along a route, which may be deemed most advantageous for such plan of deep waterway; and for the erection, equipment and maintenance of power plants, locks, bridges, dams and appliances sufficient and suitable for the development and utilization of the water power thereof; and authorize the issue, from time to time, of bonds of this State in a total amount not to exceed twenty million dollars, which shall draw interest, payable semi-annually, at a rate not to exceed four per cent per annum, the proceeds whereof may be applied as the General Assembly may provide, in the construction of said waterway and in the erection, equipment and maintenance of said power plants, locks, bridges, dams and appliances.

“All power developed from said waterway may be leased in part or in whole, as the General Assembly may by law provide; but in the event of any lease being so executed, the rental specified therein for water power shall be subject to a re-valuation each ten years of the term created, and the income therefrom shall be paid into the treasury of the State.”

The proposal to appropriate and expend moneys of the United States for the improvement of waterways the title of which, under the facts above outlined, would remain in the State of Illinois or the Sanitary District of Chicago gives rise to the question above stated.

Your question calls for a statement of the power of the United States in respect to this waterway in advance of any amendment to the constitution of Illinois; that is to say,

in the absence of an amendment to the constitution of Illinois, as there can be no assurance that its constitution will be amended.

The State constitution forbids the sale or lease of the waterway. The meaning of this constitutional provision is a State question to be finally settled by the courts of the State. Giving it, as we must, a broad construction, since it forbids parting with the title to the property or with the possession and control even for a consideration in the form of rental, it would seem to forbid the complete relinquishment and surrender of possession and control.

The result is that the real question for decision is as to what power the United States has over this waterway, and what control it may exercise under its sovereign and constitutional powers, without the consent of the State or against its will.

The general subject of a continuous waterway connection between Lake Michigan and the Mississippi River has been under consideration for more than a century. Parts of the general route embraced in the proposed project have been held to be navigable waters of the United States for certain purposes. *Escanaba Co. v. Chicago*, 107 U. S. 678, 683 (Chicago River); *Ex parte Boyer*, 109 U. S. 629, 632 (Illinois and Michigan Canal); *Economy Light and Power Co. v. United States*, 256 U. S. 113 (Des Plaines River). In the last cited case the Supreme Court said (p. 124) :

“The Desplaines River, after being of practical service as a highway of commerce for a century and a half, fell into disuse, partly through changes in the course of trade or methods of navigation, or changes in its own condition, partly as the result of artificial obstructions. In consequence, it has been out of use for a hundred years; but a hundred years is a brief space in the life of a nation; improvements in the methods of water transportation or increased cost of other methods of transportation may restore the usefulness of this stream; since it is a natural interstate waterway, it is within the power of Congress to improve it at the public expense; and it is not difficult to believe that many other streams are in like condition and require only the exertion of federal control to make them

again important avenues of commerce among the States. If they are to be abandoned, it is for Congress, not the courts, so to declare."

The power of Congress to make regulations concerning navigable waters is primarily derived from Article I, section 8, clause 3, of the Constitution, which provides that "The Congress shall have power * * * to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes." Commerce includes navigation. *Gibbons v. Ogden*, 9 Wheat, 1, 189-190, 197.

It seems to me manifest that when the Illinois waterway shall have been completed, whether by funds of the United States or of the State of Illinois, and a system of continuous water transportation between Lake Michigan and the Mississippi River provided, that system, constituting a highway of interstate commerce, will be navigable waters of the United States and subject to the control of Congress for the purpose of navigation. The power of Congress to control navigable waters does not depend upon ownership by the United States of their beds or banks. *South Carolina v. Georgia*, 93 U. S. 4; *Port of Seattle v. Oregon & Washington R. Co.*, 255 U. S. 56, 63.

The power of Congress extends to artificial waterways, such as canals, as well as to natural waterways. The fact that a waterway lies wholly within a State does not remove it from the control of Congress. *The Daniel Ball*, 10 Wall. 557; *Escanaba Company v. Chicago*, 107 U. S. 678. And it has been settled for some time that the admiralty jurisdiction of the courts of the United States extends to inland canals such as the one in question. *Ex parte Boyer*, 109 U. S. 629 (Illinois and Michigan Canal); *The Robert W. Parsons*, 191 U. S. 17 (Erie Canal). In *Ex parte Boyer*, *supra*, the Supreme Court said (p. 632) that admiralty jurisdiction attached "even though the canal is wholly artificial, and is wholly within the body of a State, and subject to its ownership and control; * * *." And in *The Robert W. Parsons*, *supra*, the Court said (pp. 26-27):

"The only distinction between canals and other navigable waters is that they are rendered navigable by artificial means, and sometimes, though by no means always, are

wholly within the limits of a particular State. We fail to see, however, that this creates any distinction in principle. They are usually constructed to connect waters navigable by nature, and to avoid the portage of property from one navigable lake or river to another; or to improve or deepen a natural channel; and they are usually navigated by the same vessels which ply between the naturally navigable waters at either end of the canal."

I see no reason why such artificial interstate waterways should not be within the power of Congress to regulate commerce through the control of navigation, as well as within the admiralty jurisdiction of the national courts. See *United States v. Cress*, 243 U. S. 316, 326. The Supreme Court has said that the purpose of the constitutional provision (Art. III, sec. 2) extending the judicial power of the United States to "all cases of admiralty and maritime jurisdiction" was to place the entire subject under national control "because of its intimate relation to interstate and foreign commerce." *Panama R. R. Co. v. Johnson*, 264 U. S. 375, 386.

In the case of *Wisconsin v. Duluth*, 96 U. S. 379, it appeared that the city of Duluth, in Minnesota, in order to improve its harbor, had constructed a canal which diverted waters from the St. Louis River. This diversion of waters injuriously affected the harbor of the city of Superior, in Wisconsin. In answer to an original bill brought by the State of Wisconsin in the Supreme Court to enjoin the diversion, the city of Duluth alleged, among other things, that the United States, acting through its legislative and executive departments, had approved the construction of the canal, had taken possession and control of the work, had appropriated and spent money on it, and adopted it as the best mode of making a safe and accessible harbor at the western end of Lake Superior. The Court, in holding that this answer was a complete defense to the bill, said (p. 387):

"Nor can there be any doubt that such action is within the constitutional power of Congress. It is a power which has been exercised ever since the Government was organized under the Constitution. The only question ever raised has been how far and under which circumstances the exercise of the power is exclusive of its exercise by the States. And

while this Court has maintained, in many cases, the right of the States to authorize structures in and over the navigable waters of the States, which may either impede or improve their navigation, in the absence of any action of the general government in the same matter, the doctrine has been laid down with unvarying uniformity, that when Congress has, by any expression of its will, occupied the field, that action was conclusive of any right to the contrary asserted under State authority. The adjudged cases in this Court on this point are numerous.

* * * * *

"If, then, Congress, in the exercise of a lawful authority, has adopted and is carrying out a system of harbor improvements at Duluth, this court can have no lawful authority to forbid the work."

See also *Bigbam Bros. v. Port Arthur Canal & Dock Co.*, 59 Tex. Civ. App. 367, 373.

Returning, then, to your question, it is clear that the completed waterway, including the structures pertaining thereto, would be subject to "the Federal laws for the protection and preservation of navigable waters." The rights of the State in such waters are subject to the plenary powers of Congress, when asserted, in the regulation of interstate commerce.

Gilman v. Philadelphia, 3 Wall. 713;

South Carolina v. Georgia, 93 U. S. 4;

Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 12-13;

Economy Light & Power Co. v. United States, 256 U. S. 113, 121;

Sanitary District of Chicago v. United States, 266 U. S. 405, 426;

New Jersey v. Sargent, 269 U. S. 328, 337.

The rule was stated by the Supreme Court in *Gilman v. Philadelphia*, *supra*, as follows (pp. 724-725):

"Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than

those in which they lie. For this purpose they are the public property of the Nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England.

"It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided."

More recently the Court, in *New Jersey v. Sargent, supra*, referred (p. 337) to:

"the doctrine, heretofore firmly settled, that the power to regulate interstate and foreign commerce, which the Constitution vests in Congress, includes the power to control, for the purposes of such commerce, all navigable waters which are accessible to it and within the United States, whether within or without the limits of a State, and to that end to adopt all appropriate measures to free such waters from obstructions to navigation and to preserve and even enlarge their navigable capacity; and that the authority and rights of a State in respect of such waters within its limits, and in respect of the lands under them, are subordinate to this power of Congress."

But the authority over navigable waters which Congress derives from its power to regulate interstate or foreign commerce extends only so far as its action bears a substantial connection with the regulation of such commerce. Thus, in *Port of Seattle v. Oregon & Washington R. Co.*, 255 U. S. 56, the Court said (p. 63):

"The right of the United States in the navigable waters within the several States is limited to the control thereof for purposes of navigation."

And in *Wisconsin v. Illinois*, 278 U. S. 367, the limitation on the power of Congress was stated as follows (p. 415):

“This Court has said that while Congress in the exercise of its power may adopt any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 62, it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end.”

See also *United States v. River Rouge Improvement Company*, 269 U. S. 411, 419.

From this review of the decisions it is clear that this waterway, when completed, being navigable waters capable of use in interstate commerce, will be wholly subject to the power of the United States to regulate commerce through control of navigation. To what extent the United States may take over possession and control of works and improvements made by the State in navigable streams, without compensation to the State, is an open question, but I am disposed to believe that if the State undertakes to improve streams which are highways of interstate commerce and to construct works for that purpose, it takes the chance that the United States may conclude to exercise its paramount authority under the Commerce Clause of the Constitution and take full charge of the improvement of navigation and of all works relating thereto. The fact that the State may have expended money in the works for the improvement of navigation on such streams can not operate to prevent the United States, under appropriate Acts of Congress, from exercising its full constitutional powers.

Some parts of this system appear to be wholly artificial, constructed with State funds, and as to them the question arises whether the United States may take over complete possession and control of an artificial highway constructed by a State, and appropriate the State's investment without the payment to it of any compensation or consideration. It has been shown that notwithstanding a waterway is artificial and built by a State, commerce and navigation on it are subject to Federal regulation and control, and it is subject to the maritime and admiralty jurisdiction of the United States. The authorities have not gone to the extent of hold-

ing that complete possession and control of such artificial waterways may be taken over from a State and the State deprived of its investment and of any return thereon without its consent. It may be that Illinois, as owner of the canal property built in part with State funds, could charge reasonable tolls to vessels passing through them. In such case, no doubt, Congress could regulate the charges. (See 33 Op. 428.) It is not apparent that the State is in any worse position than a public-service corporation which builds an artificial waterway under a State charter. Although such an artificial waterway, if a highway of interstate commerce, would be subject to regulation by Congress and its waters would be within the admiralty jurisdiction, it does not follow that the United States could take possession of it, appropriate it, exclude the owner, and deprive the latter of his investment or any return upon it.

While this question is a novel one, I find nothing in the decisions of the courts to warrant the conclusion that powers of the Federal Government over artificial waterways extend that far.

In answer to your inquiries, therefore, my conclusions are:

First: That in dealing with this problem and having in mind the fact that the Illinois constitution may never be amended, and that no State officers may ever be authorized to relinquish this waterway to the United States, we must assume that the powers of the United States are limited to those which it may exercise under the Constitution without the consent of the State.

Second: That with respect to those parts of the waterway under consideration which are navigable streams improved by the State, the powers of Congress are plenary, and without any amendment to the constitution of Illinois or any permission from the State, the United States, under appropriate Acts of Congress, may take complete control over the improvement of navigation and its regulation and provide for and insure to the public perpetual, free navigation.

Third: That as to those parts of the waterway which are entirely artificial, Congress may provide for improvement and control of navigation and for the regulation and control thereof, so as to insure to the public the right of navi-

gation, and to take such action as may be necessary to prevent interference with or obstruction to navigation, but probably subject to the qualification that without the consent of the State it can not be deprived of reasonable compensation for the use of its property.

Respectfully,

WILLIAM D. MITCHELL.

To the PRESIDENT.

PHILIPPINE ISLANDS—LEGALITY OF BOND ISSUE

The proposed issue by the Government of the Philippine Islands of bonds in the sum of \$500,000, the proceeds from the sale of which are to be used for the extension of the port works and the improvement of the harbor facilities in the City and Province of Cebu, being authorized by Congress and by Act No. 3413 of the Philippine Legislature of December 7, 1927, and being within the limit of indebtedness authorized by law, and all statutory requirements regarding the issue of such bonds having been complied with, said bonds, being the third series of bonds under Act No. 3413, *supra*, when issued in the form and amount proposed, will have been legally issued and will be valid and binding obligations of the Government of the Philippine Islands.

DEPARTMENT OF JUSTICE,

April 8, 1930.

SIR: I have the honor to acknowledge receipt of your letter of March 28, 1930, requesting my opinion as to the validity of the proposed issue by the Government of the Philippine Islands of bonds in the sum of \$500,000, being the third series and balance of the total issue of bonds in the sum of \$2,000,000, authorized by Act No. 3413, enacted by the Seventh Philippine Legislature, Third Session, approved December 7, 1927, pursuant to the Act of Congress approved August 29, 1916 (c. 416, 39 Stat. 545), as amended by the Act of May 31, 1922 (c. 203, 42 Stat. 598). The proceeds from the sale of said bonds are to be used for the extension of the port works and the improvement of the harbor facilities in the City and Province of Cebu. The first series of these bonds, dated March 1, 1928, in the amount of \$750,000, was issued in accordance with the opinion of Attorney General Sargent, dated April 17, 1928 (35 Op. 446), and the second series of said bonds, dated September 15, 1929, in the

amount of \$750,000, was issued in accordance with my opinion, dated October 12, 1929 (36 Op. 105).

You state that you are now in receipt of a request from the Governor General of the Philippine Islands that a third series in the amount of \$500,000.00, being the balance of the bonds authorized by Act No. 3413 of the Philippine Legislature, be issued and sold as soon as possible. You also state that, pursuant to Act No. 3413, you have determined that the proposed bonds shall be dated March 15, 1930, to mature in 30 years (March 15, 1960); that they shall be in coupon form only in the denomination of \$1,000.00 each and that they shall bear interest at the rate of 4½% per annum, payable semiannually.

In an opinion dated April 17, 1928 (35 Op. 446), my predecessor upheld the legality of the original authorization of the entire issue under Philippine Act No. 3413, *supra*, and approved the issuance of the first series of bonds covered by this authorization in the amount of \$750,000.00. In passing upon the legality of the proposed third issue of bonds in the sum of \$500,000.00, it is only necessary to consider whether the bonds when issued would increase the bonded indebtedness of the Government of the Philippine Islands beyond that permitted by law, and to pass upon the form of bond submitted.

Section 11 of the Act of August 29, 1916, as amended, *supra*, provides "that the entire indebtedness of the Philippine Government created by the authority conferred herein, exclusive of those obligations known as friar land bonds, shall not exceed at any one time 10 per centum of the aggregate tax valuation of its property * * *."

You enclose with your letter a copy of a memorandum by the Chief of the Bureau of Insular Affairs, in which it is stated:

"On December 31, 1928 (the latest date for which complete figures are available) the assessed valuation of taxable real property in the Philippine Islands was \$860,514,525.00. The present bonded indebtedness of the Philippine Government, exclusive of collateral bonds aggregating \$6,765,500, which are secured by an equivalent amount of bonds issued by its constituent provinces and municipalities, and of

\$4,644,000 Friar Lands Purchase Bonds now outstanding, is \$62,264,000.00. Against this indebtedness, there had been accumulated in the corresponding Philippine sinking funds, as of November 30, 1929 (the latest date for which complete figures are available) the sum of \$8,158,225.00. The present indebtedness of the Philippine Government, if increased by the bond issue of \$500,000 now proposed, will not exceed the amount authorized by Congress."

You also state that the Governor General of the Philippine Islands informed your Department on March 22, 1930, "that the total assessed valuation of taxable real property in the Philippine Islands on December 31, 1929, amounted to \$919,392,414.50."

From the foregoing statements it is apparent that the proposed third series of bonds in the sum of \$500,000.00 to be issued pursuant to Act No. 3413 of the Philippine Legislature will not increase the bonded indebtedness of the Philippine Government beyond the maximum amount authorized by law.

I find that all of the statutory requirements regarding the issue of bonds by the Government of the Philippine Islands have been complied with in this case and that the form of bond submitted by you is in substantial compliance with the law authorizing the issue. It is my opinion, therefore, that when issued in the form and amount proposed said third series of bonds in the amount of \$500,000.00 will have been legally issued and will be valid and binding obligations of the Government of the Philippine Islands.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF WAR.

PHILIPPINE ISLANDS—LEGALITY OF BOND ISSUE

The proposed issue by the Government of the Philippine Islands of bonds in the sum of \$925,000, the proceeds from the sale of which are to be used for the construction of works and improvements in the Port of Iloilo, Province of Iloilo, being authorized by Congress and by Act No. 3417 of the Philippine Legislature of December 7, 1927, and being within the maximum of indebtedness authorized by law, and all statutory requirements regarding the issue of such

bonds having been complied with, said bonds, being the third series of bonds under Act No. 3417, *supra*, when issued in the form and amount proposed, will have been legally issued and will be valid and binding obligations of the Government of the Philippine Islands.

DEPARTMENT OF JUSTICE,

April 11, 1930.

SIR: I have the honor to acknowledge receipt of your letter of April 2, 1930, requesting my opinion as to the validity of the proposed issue by the Government of the Philippine Islands of bonds in the sum of \$925,000, being the third series and balance of the total issue of bonds in the sum of \$2,175,000, authorized by Act No. 3417 of the Philippine Legislature, approved December 7, 1927, pursuant to the Act of Congress of August 29, 1916 (c. 416, 39 Stat. 545), as amended by the Act of May 31, 1922 (c. 203, 42 Stat. 598). The proceeds from the sale of said bonds are to be used for the construction of works and improvements in the Port of Iloilo, Province of Iloilo.

The first series of these bonds, dated April 1, 1928, in the amount of \$750,000 was issued in accordance with the opinion of Attorney General Sargent, dated April 17, 1928 (35 Op. 443), and the second series of said bonds, dated October 15, 1929, in the amount of \$500,000, was issued in accordance with my opinion, dated October 12, 1929 (36 Op. 102).

You state that you are now in receipt of a request of the Governor General of the Philippine Islands that a third series in the amount of \$925,000, being the balance of the bonds authorized by Act No. 3417 of the Philippine Legislature, be issued and sold as soon as possible. You also state that, pursuant to Act No. 3417, you have determined that the proposed bonds shall be dated April 15, 1930, to mature in thirty years (April 15, 1960); that they shall be in coupon form only in the denomination of \$1,000 each, and that they shall bear interest at the rate of $4\frac{1}{2}\%$ per annum, payable semi-annually.

In an opinion dated April 17, 1928, 35 Op. 443, my predecessor upheld the legality of the original authorization of the entire issue under Philippine Act No. 3417, *supra*, and approved the issuance of the first series of bonds covered by this authorization in the amount of \$750,000. In passing

upon the legality of the proposed third issue of bonds in the amount of \$925,000, it is only necessary to consider whether the bonds when issued would increase the bonded indebtedness of the Government of the Philippine Islands beyond that permitted by law, and to pass upon the form of bond submitted.

Section 11 of the Act of August 29, 1916, as amended, *supra*, provides "that the entire indebtedness of the Philippine Government created by the authority conferred herein, exclusive of those obligations known as friar land bonds, shall not exceed at any one time 10 per centum of the aggregate tax valuation of its property * * *."

You enclose with your letter a copy of a memorandum by the Chief of the Bureau of Insular Affairs, in which it is stated:

"On December 31, 1928 (the latest date for which complete figures are available) the assessed valuation of taxable real property in the Philippine Islands was \$860,514,525.00. The present bonded indebtedness of the Philippine Government, exclusive of collateral bonds aggregating \$6,765,500, which are secured by an equivalent amount of bonds issued by its constituent provinces and municipalities, and of \$4,644,000 Friar Lands Purchase Bonds now outstanding, is \$62,264,000.00. Against this indebtedness, there had been accumulated in the corresponding Philippine sinking funds, as of November 30, 1929 (the latest date for which complete figures are available) the sum of \$8,158,225.00. The present indebtedness of the Philippine Government, if increased by the bond issue of \$925,000 now proposed, will not exceed the amount authorized by Congress."

You also state that the Governor General of the Philippine Islands informed your Department on March 22, 1930, "that the total assessed valuation of taxable real property in the Philippine Islands on December 31, 1929, amounted to \$919,392,414.50."

From the foregoing statements it is apparent that the proposed third series of bonds in the sum of \$925,000, to be issued pursuant to Act No. 3417 of the Philippine Legislature, together with the bonds in the amount of \$500,000 recently authorized to be issued pursuant to the authority contained in Act No. 3413 of the Philippine Legislature, will

not increase the bonded indebtedness of the Philippine Islands beyond the maximum amount authorized by law.

I find that all of the statutory requirements regarding the issue of bonds by the Government of the Philippine Islands have been complied with in this case and that the form of bond submitted by you is in substantial compliance with the law authorizing the issue. It is my opinion, therefore, that when issued in the form and amount proposed said third series of bonds in the amount of \$925,000 will have been legally issued and will be valid and binding obligations of the Government of the Philippine Islands.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF WAR.

**PARDONING POWER OF GOVERNOR OF THE PANAMA CANAL—
NARCOTIC DRUGS IMPORT AND EXPORT ACT**

The Governor of the Panama Canal has no authority to pardon Rafael Garcia Burban for the commission of the offense of having violated section 2, subdivision (c), of the Narcotic Drugs Import and Export Act of May 26, 1922 (42 Stat. 596).

DEPARTMENT OF JUSTICE,

May 9, 1930.

SIR: I have the honor to refer to your letter of March 15, 1930, requesting my opinion as to the power of the Governor of the Panama Canal to pardon one Rafael Garcia Burban who, on May 11, 1925, was convicted in the District Court of the Canal Zone and sentenced to ten years imprisonment in the Penitentiary at Gamboa, Canal Zone, where he is still confined, and to pay a fine of \$5,000, for violation of section 2, subdivision (c) of the Narcotic Drugs Import and Export Act of May 26, 1922, c. 202, 42 Stat. 596, which provides:

“That if any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported con-

trary to law, such person shall upon conviction be fined not more than \$5,000 and imprisoned for not more than ten years."

In the opinion of your Judge Advocate General, copy of which was received with your letter, it is suggested that the power of the Governor of the Panama Canal to pardon Rafael Garcia Burban depends upon whether the Narcotic Drugs Import and Export Act, *supra*, is a local law of the Panama Canal.

In the recent case of *United States v. Guinane*, the District Court of the Panama Canal sustained a demurrer to an information charging a violation of the National Prohibition Act, upon the ground that Congress in extending that Act to the Panama Canal made it a local law of the Panama Canal and, therefore, that the information should have been brought in the name of the Government of the Panama Canal and should have charged the commission of an offense against and in violation of a law of that Government instead of having been brought in the name of the United States and having charged the commission of an offense against and in violation of a law of the United States. The Judge Advocate General's opinion suggests that this decision is equally applicable to the Narcotic Drugs Import and Export Act, *supra*.

Under the rule that the conclusions of a Federal Court, until reversed or overruled, are binding upon the Attorney General (10 Op. 347; 20 id. 618, 729; 23 id. 221; 24 id. 59; 29 id. 99; 32 id. 472; 33 id. 86; 35 id. 297), the decision in *United States v. Guinane*, *supra*, would have an important bearing upon the question whether the Narcotic Drugs Import and Export Act, *supra*, is a local law of the Panama Canal Zone. But upon that question I express no opinion because the nature of the offense of which Rafael Garcia Burban has been convicted is necessarily determined by the record of his conviction. If there was error in denominating the offense this could only be corrected by appeal and unless reversed the conviction itself defines the offense. Any other test would lead to a perversion of the pardoning power and confusion in its exercise.

The District Court of the Canal Zone sits as a Court of the Canal Zone and also as a Court of the United States

depending upon whether the defendant is charged with the commission of an offense against the United States or of an offense against the government of the Canal Zone. (Act of September 21, 1922, c. 370, secs. 8 and 9, 42 Stat. 1004, 1005-6.) It appears that at the time Burban was tried and convicted the practice then was for the District Attorney to determine from the nature and character of the offense whether it was an offense against the United States or an offense against the Government of the Canal Zone, and where he concluded that the offense was one against the United States, to file the information in the name of the United States and to charge the commission of an offense against and in violation of a law of the United States; but where he determined that the offense was one against the Government of the Canal Zone, to file the information in the name of the Government of the Canal Zone and to charge the commission of an offense against and in violation of a law of that government. Following this practice, the District Attorney being of the opinion that the Narcotic Drugs Import and Export Act, *supra*, was a law of the United States and that a violation thereof was an offense against the United States, filed the information in the name of *The United States of America v. Rafael Garcia Burban*, and charged the defendant as follows:

"Rafael Garcia Burban on the 30th day of March, A. D., 1925, in the division aforesaid, did then and there at Cristobal, in the Canal Zone, on board the Steamship Oranje Nassau of the Royal Netherlands West India Mail Steamship Company, wilfully, unlawfully, and knowingly violate subdivision (c) of Section 2 of the Act of Congress of February 9, 1909, entitled, 'An Act to prohibit the Importation and Use of Opium for other than Medicinal Purposes,' as amended by the Act of Congress of May 26, 1922, in that he, the said Rafael Garcia Burban, did then and there bring into the Canal Zone a certain quantity of cocaine hydrochloride, to-wit, one bottle containing twenty-five grammes, more or less, of cocaine hydrochloride, and so did then and there commit the offense of a felony, contrary to the law in such case made and provided and against the peace and dignity of the Government of the United States of America."

The information charged, and Burban was tried, convicted, and sentenced, and is now confined in a penitentiary, for the commission of an offense against the United States. Hence, in exercising the power of pardon, it must be assumed that Rafael Garcia Burban violated a law of the United States and was convicted of an offense against the United States.

Thus the question for determination is whether the Governor of the Panama Canal has the power to pardon the commission of an offense against the United States.

The consideration of this question requires a brief reference to the statutes and Executive Orders relating to the acquisition, construction, organization and government of the Panama Canal and the Canal Zone.

By the Act of June 28, 1902, c. 1302, 32 Stat. 481, the President was authorized to acquire from the Republic of Columbia, lands necessary for the construction of the Panama Canal, and upon the acquisition thereof to proceed with the construction of the Canal, to make rules and regulations for the preservation of order and public health within the acquired territory, and to establish judicial tribunals to enforce such rules and regulations. To assist him in this work, the President was authorized to appoint, by and with the consent of the Senate, an Isthmian Canal Commission of seven members, who were to be in all matters subject to his direction and control.

On November 3, 1903, a province of Colombia, known as Panama, and through which the Canal was to be constructed, declared its independence from Colombia; and on November 6, 1903, the United States recognized the independence of Panama. *Wilson v. Shaw*, 204 U. S. 24, 32. On November 18, 1903, the United States and the Republic of Panama entered into a treaty, by Article II of which the Republic of Panama ceded to the United States in perpetuity the use, occupation, and control of a zone of land and land under water for the construction, maintenance, operation, sanitation, and protection of the Canal, of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the Canal to be constructed; the zone being in the Caribbean Sea, three

marine miles from mean low water mark and extending to and across the Isthmus of Panama into the Pacific Ocean to a distance of three marine miles from mean low water mark. By Article III Panama granted to the United States all right, power and authority within the zone mentioned and described in Article II. 33 Stat. 2234.

The Act of Congress of April 28, 1904, c. 1758, 33 Stat. 429, entitled "An Act to provide for the temporary government of the Canal Zone * * * and for other purposes," granted to the President, until the expiration of the 58th Congress, all military, civil, and judicial powers, as well as the power to make all rules and regulations necessary for the government of the Canal Zone, and all rights, power, and authority, granted by the terms of the treaty to the United States, to be vested in such persons and to be exercised in such manner as the President directed for the government of the Canal Zone, and maintaining and protecting the inhabitants thereof in the full protection of their life, liberty, and religion.

Pursuant to the authority contained in the above Acts, the President created the Isthmian Canal Commission by Executive Order on May 9, 1904, and appointed a member of the Commission as Governor of the Canal Zone. The Commission was authorized and directed by the President to proceed with the construction of the Canal and, among other things, to legislate on all rightful subjects of legislation not inconsistent with the laws and treaties of the United States so far as they applied to the Canal Zone. In pursuance of this authority the Commission by Act No. 1 of August 16, 1904, established a judiciary for the Canal Zone, by Act No. 14 of September 3, 1904, established a Penal Code, and by Act No. 15 of September 3, 1904, established a Code of Criminal Procedure. The Penal Code defined various crimes and the Code of Criminal Procedure enacted that in the prosecution of offenses under the Penal Code the action shall be brought "in the name of the Government of the Canal Zone."

By Act No. 8, enacted on September 2, 1904, and entitled "An Act to provide for the organization of the executive branch of the government of the Canal Zone, Isthmus of Panama," we first find authority vested in the Governor to grant pardons and reprieves. This Act reads:

"By authority of the President of the United States, be it enacted by the Isthmian Canal Commission:

* * * * *

"SEC. 4. The powers and duties of the Governor of the Canal Zone are as declared and set forth in the Executive Order, dated May 9, 1904, as follows:

"* * * * * He (the governor) is hereby vested with the power to grant reprieves and pardons for offenses against the rules, regulations, and laws in force by virtue of action of the Commission or by virtue of the clause hereof continuing in force the laws of Panama. * * *'" (Words in parenthesis supplied.)

By the Act of August 24, 1912, c. 390, section 4, 37 Stat. 560, the President was authorized to discontinue the Canal Commission and thereafter to complete, govern, and operate the Panama Canal and govern the Canal Zone, or cause them to be completed, governed, and operated, through a Governor of the Panama Canal and such other persons as he might deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the Canal and Canal Zone.

Section 7 of this Act provided:

"That the governor of the Panama Canal shall, in connection with the operation of such canal, have official control and jurisdiction over the Canal Zone and shall perform all duties in connection with the civil government of the Canal Zone, which is to be held, treated, and governed as an adjunct of such Panama Canal. Unless in this Act otherwise provided all existing laws of the Canal Zone referring to the civil governor or the civil administration of the Canal Zone shall be applicable to the governor of the Panama Canal, who shall perform all such executive and administrative duties required by existing law."

It further provided, among other things, that "the disposition, treatment, and pardon of convicts shall be established by order of the President." This provision of law is still in effect. (Act of September 21, 1922, c. 370, 42 Stat. 1004.) By virtue of this authority the President, on May 13, 1914, promulgated the following Executive Order:

"The Governor of the Panama Canal is hereby empowered to grant pardons and reprieves for offenses against the laws, orders, and regulations of the Canal Zone; and to commute sentences, and to remit fines and forfeitures. He may establish a system of paroling prisoners, and alter or amend the same from time to time."

This Executive Order was amended by section 1 of the Executive Order of March 5, 1924, to read:

"The Governor of the Panama Canal is hereby empowered to grant pardons, paroles, and reprieves for offenses against the laws, orders, and regulations of the Canal Zone, and to commute sentences and remit fines and forfeitures. He may establish by order a system for the pardon, parole, reprieve, disposition, or treatment of prisoners, and alter or amend the same from time to time."

The above Executive Order was amended by the Executive Order of December 31, 1929, which is the Order now in effect and which reads:

"The Governor of the Panama Canal is hereby empowered to grant pardons, paroles, and reprieves for offenses against the laws, orders, and regulations of the Canal Zone, and to commute sentences and remit fines and forfeitures: *Provided, however,* That no pardon, parole, reprieve, or commutation of sentence shall be granted by the Governor, and no fine or forfeiture shall be remitted, until an application therefor shall have been submitted to a pardon board of five members, to be designated by the Governor, and approved in writing by the majority thereof."

These Executive Orders limit the pardoning power of the Governor of the Panama Canal to offenses against the laws, orders, and regulations of the Canal Zone. As Congress has not attempted to authorize the Governor to pardon offenses against the United States and the President has not attempted to delegate the power vested in him under Article II, Section 2, Clause I of the Constitution of the United States to grant pardons for offenses against the United States, it is unnecessary to consider the validity of any such delegation of authority to the Governor by Congress or by the President.

It is my opinion, therefore, that the Governor of the Panama Canal has no authority to pardon Rafael García

Burban for the commission of the offense of having violated section 2, subdivision (c) of the Narcotic Drugs Import and Export Act of May 26, 1922, *supra*.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF WAR.

APPLICATION OF EDWARD VOLLRATH FOR RETIREMENT
UNDER EMERGENCY OFFICERS' RETIREMENT ACT

Edward Vollrath on May 23, 1929, deposited in the post office at Bucyrus, Ohio, a registered letter containing his formal application for retirement, under the Emergency Officers' Retirement Act of May 24, 1928, addressed to the regional office of the United States Veterans' Bureau at Cleveland, Ohio, which was received in the post office at Cleveland, Ohio, at 8.15 a. m. on May 24, 1929, but was not received in the bureau's regional office in that city until the morning of May 25, 1929. *Held*, that Vollrath's application was not received in the United States Veterans' Bureau within twelve months after the passage of the Emergency Officers' Retirement Act, as required by section 2 of said Act; and that there is no ground upon which it may be held that the Veterans' Bureau is authorized to consider it.

DEPARTMENT OF JUSTICE,

May 10, 1930.

SIR: I have the honor to comply with your request of March 3, 1930, for my opinion as to whether under the facts hereinafter set forth, Edward Vollrath seasonably filed an application for retirement in accordance with the provisions of the Emergency Officers' Retirement Act of May 24, 1928, 45 Stat. 735.

Under section 1 of that Act all persons who served as officers of the Army, Navy, or Marine Corps during the World War, other than as officers of the Regular Army, Navy, or Marine Corps, and who during such service incurred physical disability in the line of duty, and had been, or within one year after the passage of the Act, might be, rated at not less than 30 per centum permanent disability by the United States Veterans' Bureau, might be retired, upon application, with 75 per centum of the pay to which they were entitled at the time of discharge from their commissioned service. Those who were rated at less than 30 and more than 10 per

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centum permanent disability might be retired without pay, but were allowed "such compensation and other benefits as are now or may hereafter be provided by law or regulations of the United States Veterans' Bureau * * *."

The limitation which governed the timeliness of applications for the benefits of the Act is set forth in section 2, as follows:

"No person shall be entitled to benefits under the provisions of this Act except he make application as hereinbefore provided and his application is received in the United States Veterans' Bureau within twelve months after the passage of this Act: *Provided*, That the said director shall establish a register, and applications made hereunder shall be entered therein as of the actual date of receipt, in the order of receipt in the Veterans' Bureau, and such register shall be conclusive as to date of receipt of any application filed under this Act.
* * *

Since the Act was approved May 24, 1928, the twelve-months period fixed for the receipt of applications expired at midnight May 24, 1929. You advise that on May 23, 1929, Mr. Vollrath deposited in the post office at Bucyrus, Ohio, a registered letter containing his formal application for retirement, addressed to the regional office of the United States Veterans' Bureau at Cleveland, Ohio, which was received in the post office at Cleveland, Ohio, at 8.15 a. m., on May 24, 1929, but was not received in the bureau's regional office in that city until the morning of May 25, 1929. The post-office authorities at Cleveland state that delay in the delivery of the registered letter to the regional office was due to the fact that an employee of the regional office called only once each day, at 8.00 a. m., for registered mail, and that the letter in question was received on the morning of May 24, 1929, shortly after the employee had made his call. The manager of the Veterans' Bureau regional office at Cleveland states that it had always been the practice for the employee of the regional office to secure all mail available at the time of his call at the post office, including registered mail; that it had always been the practice for the letter carrier, upon his later deliveries, to deliver such mail as accumulated during the day, after the call of the regional

office employee, including registered letters; that, however, about April, 1929, the practice was changed by the postal employees, and thereafter the registered official letters—that is, registered letters addressed to the bureau or the regional manager—were not given to the carrier for delivery but were held for the daily call of the regional office employee. He further says that since the bureau was not notified of such change in procedure and the carrier continued to deliver registered mail which was addressed to individuals at the regional office, the bureau had no knowledge that all registered communications were not being delivered in accordance with the original practice.

The first question is whether upon the facts above set forth the application was received in the Veterans' Bureau, within the meaning of the statute, before midnight of May 24, 1929.

The language of section 2 of the Act is plain and unambiguous. It requires the receipt of an application "in the United States Veterans' Bureau" within twelve months after the passage of the Act. It also requires the director to establish a register, and to enter applications therein as of "the actual date of receipt and in the order of receipt in the Veterans' Bureau," and makes such register conclusive as to the date of receipt of any application "filed" under the Act.

The compensation or pay provided under the Act is in the nature of a pension. In the recent case of *Calhoun, Admr., v. United States*, 66 Ct. Cl. 545, it was said (p. 550):

"* * * Retired pay is not compensation for service performed. As used in the military and naval service, retired pay is a gratuity given in worthy cases in recognition of past services, for which no service whatever is rendered, and is usually in a sum less than the active-service pay. Essentially, it is a pension. * * *" See also *Geddes v. United States*, 38 Ct. Cl. 428, 446.

Respecting the nature of a pension, the Court said in *Donnelly v. United States*, 17 Ct. Cl. 105, 108:

"A pension is a periodical allowance of money to a person, in the nature partly of a gratuity and partly of payment for past benefits conferred; payment because it is supposed to be in consideration of previous services rendered to the govern-

ment or the public, for which the compensation before made, if any, was inadequate in proportion to the benefits received and the ability of the nation in its prosperity to pay; a gratuity because it is not ordinarily founded on contract, and in such case can not be demanded as a legal right until the government has acknowledged its moral obligation and made the grant. As it is purely voluntary, its payment must be made and accepted in exact conformity with the terms of the grant, and must be subject to all the limitations, conditions, and exceptions therein contained."

The above cases establish that the pay or compensation provided by the Emergency Officers' Retirement Act, *supra*, is in the nature of a pension and is not a matter of contract; and that its payment must be made and accepted in exact conformity with the terms of the Act creating the same and is subject to all limitations and conditions therein contained.

Applying these rules to the instant case, it is clear that the action of Mr. Vollrath in mailing his application at Bucyrus, Ohio, on the day before the expiration of the twelve months period did not give rise to any contractual relationship between him and the government. There is therefore no occasion for the application of the familiar rule of contracts that an offer is accepted and the contract completed the moment a letter of acceptance is mailed. On the contrary, if the instant case were assimilated to cases of contracts entered into by mail, the mailing of the application by Mr. Vollrath would be more analogous to an offer on his part to accept the benefits of the Act in the event the Veterans' Bureau should determine him entitled thereto. Receipt of his application by the post office would then not amount to receipt by the Veterans' Bureau, under the settled rule that, where a person uses the mail to make an offer, the post office becomes his agent to carry the offer. The offer is not made when the letter is posted but when it is received, and the offerer must suffer the consequences arising from delay or mistake by the post office. See Williston on Contracts, section 34.

It may be suggested that support for a conclusion that Mr. Vollrath's application was in time is found in those in-

insurance cases which hold that proofs of loss are duly "rendered" to an insurance company if deposited in the mails within the time specified in the policy, although not received by the company until after the specified time. See *Manufacturers, etc., Ins. Co. v. Zeitinger*, 168 Ill. 286; *Craig v. Insurance Co.*, 80 S. C. 151. But there are other cases directly to the contrary. See *Peabody v. Satterlee*, 166 N. Y. 174; *Davis & Son v. Russian Transport & Ins. Co.*, 182 App. Div. 668. And there would seem to be a clear distinction between the word "render," which was construed in those cases and the words "received in the Veterans' Bureau," here involved. Where the undertaking is to "present" the proofs of loss, it is not met by a mere mailing of the same within the stated period. *Martin v. Illinois Commercial Men's Ass'n*, 195 Ill. App. 421. Nor is mailing sufficient where documents are required to be "filed" within a prescribed period. *United States v. Lombardo*, 241 U. S. 73; *State v. Erickson*, 152 Minn., 349; *In re State, ex rel Attorney General*, 185 Ala. 347; *Farmers State Bank v. Thompson*, 261 Fed. 166 (C. C. A. 5th). It is true that there is authority for the proposition that the language of an insurance policy that it is not to be effective until "delivered" to or "received" by the insured is satisfied by a mailing of the policy for the sole purpose of unconditional delivery. See *Jackson v. New York Life Ins. Co.*, 7 F. (2d) 31 (C. C. A. 9th), and cases cited. These cases, however, are based upon an application of the rule of contracts that an acceptance of an offer is effective when mailed and, for the reasons above stated, have no application to the present question.

In my judgment the statute here involved does not permit a construction that an application may be regarded as "received in the Veterans' Bureau" when it is deposited in the mail. Nor is there any ground on which a conclusion may properly be reached that the fact that this application had not only been deposited in the mail but received in the post office at Cleveland before the expiration of the twelve months' period was equivalent to receipt in the Veterans' Bureau. I am therefore of the opinion that the requirement of section 2 with respect to the time of application was not complied with.

It may be suggested, however, that receipt of the application in the Veterans' Bureau was prevented by the acts or omissions of agents of the Government and that accordingly compliance with this requirement was excused or the Government estopped to assert noncompliance. It may be questioned whether the ordinary rule that prevention of performance of a condition is an excuse for nonperformance thereof has any application here, in view of the well settled doctrine that "the Government is not responsible for the laches or the wrongful acts of its officers," *Hart v. United States*, 95 U. S. 316, 318. See also *Yuma Water Ass'n v. Schlecht*, 262 U. S. 138, 143-144; *German Bank v. United States*, 148 U. S. 573, 579; *Robertson v. Sichel*, 127 U. S. 507, 515; *Utah Power & Light Co. v. United States*, 243 U. S. 389, 409; *United States v. Pine River Logging & Improvement Co.*, 89 Fed. 907, 917, aff'd 186 U. S. 279. None of the above-cited cases in which this rule has been enunciated, however, is exactly similar to the present one and it is not necessary to rely upon it here. Upon the facts as you state them, I find no basis for an assertion that there was any negligence on the part of officers or employees of the Veterans' Bureau or that they may fairly be said to have been responsible for the nonreceipt of the application in the Cleveland regional office before midnight of May 24, 1929. Upon your statement, the Veterans' Bureau had no reason to suppose that registered official mail not collected by its employee upon his early morning call would not be delivered by the post office during the day in the ordinary manner. The failure of the postal authorities to deliver this letter promptly may not properly be considered in excuse for noncompliance with the requirements of the statute. The post office was the agency selected by the applicant for the transmission of his application. In transactions between private parties he would take the risk of its negligence, and in my judgment the situation is not changed by the fact that the document transmitted was one which might give rise to a claim against the Government.

I am therefore of the opinion that Mr. Vollrath's application was not received in the United States Veterans' Bureau within twelve months after the passage of the Emergency Officers' Retirement Act, *supra*, and that there is no ground

upon which it may be held that the Veterans' Bureau is authorized to consider it.

Respectfully,

WILLIAM D. MITCHELL.

TO THE DIRECTOR, UNITED STATES VETERANS' BUREAU.

AUTHORIZED NUMBER OF LINE OFFICERS OF THE NAVY

The total authorized number of commissioned officers of the active list of the line of the Navy, exclusive of commissioned warrant officers, should be computed upon the basis of 4 per centum of 137,485, comprising the permanent authorized enlisted strength of 131,485 plus 6,000 apprentice seamen; and, in determining whether the number of officers thus computed have been commissioned, officers designated pursuant to law as additional numbers in grade should be excluded.

DEPARTMENT OF JUSTICE,

May 19, 1930.

SIR: I have the honor to reply to your letter of March 13, 1930, requesting my opinion for the guidance of the Navy Department in the assignment of appointments to the 1930 Graduating Class of the United States Naval Academy.

Receipt is acknowledged of a letter bearing date May 14, 1930, from the Acting Judge Advocate General of the Navy enclosing a memorandum with reference to the authorized number of line officers of the Navy. In referring to this memorandum the Acting Judge Advocate General states:

"You will note from the inclosure that there will be ample vacancies in the line for the appointment of all midshipmen of this year's graduating class if it should be determined that the maximum authorized number of commissioned officers of the line of the Navy, exclusive of commissioned warrant officers, is to be arrived at by computing 4 per cent of the permanent authorized enlisted strength of 131,485, plus 6,000 apprentice seamen and adding 60 additional number officers to the result, making a total authorized number of 5,559 commissioned line officers, exclusive of commissioned warrant officers. The question whether 14,000 enlisted men authorized for instruction in trade schools in addition to the permanent authorized enlisted

strength of the Navy may be included in computing the number of commissioned officers will not, therefore, be of any practical importance this year if it shall be determined that the computation should be made in the manner hereinbefore stated. It will, however, be further noted that the question of including trade school men in the computation will be of very great practical importance next year at which time, according to the present estimates, there will be 68 surplus graduates if these men are excluded, and that the question will be progressively important in the subsequent years."

This opinion is accordingly confined to a consideration of the questions (1) whether in computing the total authorized number of commissioned officers of the active list of the line of the Navy, exclusive of commissioned warrant officers, the 4 per centum fixed by law as the basis for such computation may properly be applied to the number 137,485, comprising the permanent authorized enlisted strength of 131,485 plus 6,000 apprentice seamen; and (2) whether officers who are or may be designated pursuant to law as additional numbers in grade are to be excluded from the authorized 4 per centum.

In an opinion of September 5, 1922 (33 Op. 311, 315), the Attorney General advised your predecessor that "the total number of commissioned officers of the active list of the line of the Navy may be computed at the present time upon the basis of the total authorized enlisted strength of 131,485 men as provided in the Act of July 1, 1918." There has been no pertinent change in the statutes. As you suggest, however, the particular question then under consideration was merely whether the Navy Department should use that figure or a lower figure representing the average number of enlisted men in the Navy as provided in the Act of July 1, 1922. The question was not presented, nor any opinion expressed, as to whether any enlisted men in addition to the 131,485 should also be considered in computing the number of officers.

The Act of August 29, 1916, c. 417, 39 Stat. 556, 576, directed that:

"Hereafter the total number of commissioned officers of the active list of the line of the Navy, exclusive of com-

missioned warrant officers, shall be four per centum of the total authorized enlisted strength of the active list, exclusive of the Hospital Corps, prisoners undergoing sentence of discharge, enlisted men detailed for duty with the Naval Militia, and the Flying Corps * * *."

This statute carried appropriations for enlisted men on the active list as follows (p. 575):

"pay of petty officers, seamen, landsmen, and apprentice seamen, including men in the engineers' force and men detailed for duty with the Fish Commission, *sixty-eight thousand seven hundred men, and the President is hereafter authorized, whenever in his judgment a sufficient national emergency exists, to increase the authorized enlisted strength of the Navy to eighty-seven thousand men*; and pay of enlisted men of the Hospital Corps, and for the pay of enlisted men detailed for duty with the Naval Militia, \$30,655,704.29; pay of enlisted men undergoing sentence of court-martial, \$225,000, and hereafter the number of enlisted men of the Navy shall be exclusive of those sentenced by court-martial to discharge; and as many machinists as the President may from time to time deem necessary to appoint; and six thousand apprentice seamen under training at training stations, and on board training ships, at the pay prescribed by law, \$999,630; * * * *Provided, That the enlisted strength of the Navy authorized in this Act shall be deemed to include all enlistments heretofore made during this calendar year which may have been in excess of the number authorized by law at the time * * **" (Italics ours.)

Thus the enlisted men of the Hospital Corps, the Naval Militia, those sentenced by court-martial to discharge, and 6,000 apprentice seamen under training were not, for the purposes of this Act, included in "the authorized enlisted strength of the Navy" (68,700, authorized to be increased to 87,000 mer. by the President in case of emergency). In the same Act, computation of the number of commissioned officers of the active list was based upon "the total authorized enlisted strength of the active list," excluding from the total only a part of the enlisted men excluded from the 68,700 (see quotation *supra*). It is therefore obvious that the figure 68,700 was not regarded as the total authorized

enlisted strength, and that in computing the number of commissioned officers of the active list under the Act of August 29, 1916, it was contemplated that there should be added to the 68,700 6,000 apprentice seamen under training who were in terms excluded from the 68,700 men but were not excluded from the total authorized enlisted strength.

By the Act of May 22, 1917 (c. 20, 40 Stat. 84), "the authorized enlisted strength of the active list of the Navy" was temporarily increased from 87,000 to 150,000 "including four thousand additional apprentice seamen," and the appointment of additional commissioned officers based upon this temporary increase was authorized; it being provided that such additional appointments should continue in force not later than six months after termination of the War. This legislation was of a purely temporary character.

By the Act of July 1, 1918, c. 114, 40 Stat. 704, 714, "the authorized enlisted strength of the active list of the Navy" was permanently increased from 87,000 to 131,485, and by amendment of the Act of May 22, 1917, was temporarily increased to 181,485. This statute continued in effect the method of the Act of 1916 for the computation of the number of commissioned officers at 4 per centum of "the total authorized enlisted strength of the active list," exclusive of the Hospital Corps, prisoners undergoing sentence and discharge, enlisted men detailed for duty with the Naval Militia, and the Flying Corps, and redefined the term "authorized enlisted strength" as meaning the total number of enlisted men of the Navy authorized by law exclusive of these four classes and exclusive also of apprentice seamen, those furloughed without pay, and those under instruction in the trade schools. The phrase "the total authorized enlisted strength of the active list" as used in the Act of August 29, 1916, and the phrases "authorized strength of the Navy" as used in the Act of August 29, 1916, and "authorized enlisted strength" as used in the Act of July 1, 1918, were thus sharply distinguished by excluding apprentice seamen from the two latter phrases but not from the former phrase, which is the basis for computing the number of commissioned officers. The legislative intent is therefore plain that the computation of the total number of com-

missioned officers should be based upon the authorized enlisted strength as fixed by law, plus apprentice seamen. I find nothing in any later statute which can have the effect of excluding the authorized number of apprentice seamen from this basis of computation.

By the Act of July 11, 1919 (c. 9, 41 Stat. 131), the temporary increases in the authorized enlisted strength of the active list of the Navy were required to be gradually reduced, so that after June 30, 1920, the permanent authorized strength of 131,485 was restored, with authority, however, in the President to increase this figure to 191,000 men in case of a national emergency (41 Stat. 137, 138). In making these reductions Congress departed from its usual practice and directed that the total authorized strength specified in this Act should include the Hospital Corps, apprentice seamen, those sentenced by court-martial to discharge, enlisted men of the Flying Corps, those under instruction in trade schools, and members of the Naval Reserve Force so serving. But these provisions were limited by the following proviso (41 Stat. 138) :

“Provided further, That nothing herein shall be construed as affecting the permanent, commissioned, or enlisted strength of the Regular Navy as authorized by existing law.”

The authorized number of apprentice seamen “under training at training stations and on board training ships” was fixed by the Act of August 29, 1916, at 6,000. This number was temporarily increased by the Act of July 1, 1918, but reduced to the 1916 figure by the Act of July 1, 1922, and it has not since been changed. It is accordingly my opinion that in computing the total authorized number of commissioned officers of the active list of the line of the Navy, exclusive of commissioned warrant officers, 4 per centum may be applied to the number 137,485, comprising the permanent authorized enlisted strength of 131,485, plus 6,000 authorized apprentice seamen.

The practice of designating officers as additional numbers in the various grades, either by promotion for distinguished service or by reinstatement after separation from service, originated when the numbers in each grade were

fixed by Acts of Congress. (Act of August 5, 1882, c. 391, 22 Stat. 284, 285; Act of March 3, 1899, c. 413, 30 Stat. 1004, 1005; Act of March 3, 1903, c. 1010, 32 Stat. 1177, 1197.) These appointments were in addition to the number fixed for each grade, and therefore in addition to the aggregate number of officers in all grades. (Acts of March 3, 1901, c. 852, 31 Stat. 1107, 1108 (U. S. C., Title 34, Sec. 344); June 16, 1906, c. 3338, 34 Stat. 296 (U. S. C., Title 34, Sec. 343); June 30, 1906, c. 3911, 34 Stat. 634; June 23, 1926, c. 663, 44 Stat. 764; February 16, 1927, c. 156, 44 Stat. 1103; May 28, 1928, c. 825, 45 Stat. 790; February 18, 1929, c. 261, 45 Stat. 1228.) The Act of August 29, 1916, c. 417, 39 Stat. 556, 576, substituted for fixed statutory enumeration of each grade a mathematical formula pursuant to which the Secretary of the Navy should from time to time fix the numbers in the various grades. The pertinent provisions of this Act have been carried into the United States Code (Title 34, secs. 4, 7, and 8), and read as follows:

"4. Distribution of commissioned line officers among grades.—The total number of commissioned line officers on the active list at any one time, exclusive of commissioned warrant officers, shall be distributed in the proportion of one of the grade of rear admiral to four in the grade of captain, to seven in the grade of commander, to fourteen in the grade of lieutenant commander, to thirty-two and one-half in the grade of lieutenant, to forty-one and one-half in the grades of lieutenant (junior grade) and ensign, inclusive. (Aug. 29, 1916, c. 417, 39 Stat. 576.)

"7. Dates for determining number of officers in various grades and ranks of line and staff.—To determine the authorized number of officers in the various grades and ranks of the line and of the staff corps as provided in sections 4 and 5 computations shall be made by the Secretary of the Navy at least once each year, and at such times as he may direct, and the resulting numbers in the various grades and ranks, as so computed, shall be held and considered for all purposes as the authorized number of officers in such various grades and ranks and shall not be varied between such computations. (Aug. 29, 1916, c. 417, 39 Stat. 577; July 11, 1919, c. 9, 41 Stat. 139.)

*"8. Officers excluded from consideration in determining number.—*For the purpose of determining the authorized number of officers in any grade or rank of the line or of the staff corps, there shall be excluded from consideration those officers carried by law as additional numbers, including staff officers permanently commissioned prior to August 29, 1916, with the rank of rear admiral. (Aug. 29, 1916, c. 417, 39 Stat. 577.)"

Under these provisions, once the Secretary makes his mathematical determination the numbers are quite as definitely fixed for each grade as if fixed by Act of Congress, and numbers thereafter added are as clearly in addition to the whole number in all grades as they are additional to the particular grades to which they may be added. It is therefore apparent that officers designated as additional numbers required to be excluded from the computation of the number of officers in each grade are not to be included in computing the aggregate number in all grades, and the conclusion follows mathematically that they are not to be counted in determining whether or not additional officers may be commissioned without exceeding 4 per centum of the total authorized enlisted strength of the active list.

The result is that you may lawfully compute the total authorized number of commissioned officers of the active list of the line of the Navy, exclusive of commissioned warrant officers, at 4 per centum of 137,485, and in determining whether the number of officers thus computed have been commissioned you may exclude officers designated pursuant to law as additional numbers in grade.

Thus concluding, it becomes unnecessary for your present purposes for me to express any opinion upon the question as to whether 14,000 enlisted men temporarily authorized by the Act of July 1, 1918, for instruction in trade schools may be included in the figure, 4 per centum of which is to be taken in computing the number of commissioned officers. This question can not arise until 1931, and will not certainly arise at that time. I may, however, say for your guidance, in contemplating the situation which may arise when the Class of 1931 graduates

from the United States Naval Academy, that this question is left in considerable doubt by the pertinent Acts of Congress, which do not clearly disclose whether or not such men are to be counted in computing the number of commissioned officers. The intention of Congress on this subject is obscure, and it therefore appears most desirable that clarifying legislation be enacted, well in advance of the graduation from the Naval Academy of the Class of 1931.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE NAVY.

CONVEYANCE OF FEE TO GOVERNMENT WITH RESERVATION OF SUBSURFACE RIGHTS FOR RAILROAD PURPOSES

In the proposed acquisition by the Government of certain land in New York City for a post-office site, the real ownership of which is now in the Pennsylvania Railroad & Tunnel Company, though the record title is in the name of a subsidiary corporation, *held*, upon the assumptions herein made, that the corporation which now owns the property has the power to convey the fee, reserving to the railroad company the use of the subsurface for the operation of its railroad and for station purposes, to any person or corporation or to the Government, and that such a conveyance need not limit the use of the property to railroad purposes.

DEPARTMENT OF JUSTICE,

April 22, 1930.

SIR: I have the honor to acknowledge receipt of your letter of February 10, 1930, in which you request my opinion on certain questions arising in connection with the acquisition by the Government of land fronting on Ninth Avenue, between Thirty-first and Thirty-third Streets, New York City, on which it is proposed to construct a new building, adjacent to the present post-office building, in which to handle the increased postal business of that city.

You state that the real ownership of the property is now in the Pennsylvania Railroad & Tunnel Company; though the record title is in the name of a subsidiary corporation and was originally acquired by purchase by a railroad company, which was apparently a predecessor in the chain of title; that the whole of the property has been excavated for

a number of feet below the surrounding street levels, and is used for the tracks of the railroad company; that it is proposed to acquire the fee to the property, subject to the right of the railroad company to use the subsurface for the operation of its railroad and for station purposes; and that the contemplated Federal building is to be constructed on an elevated platform, supported on piers or columns, located between the tracks of the railroad company.

You further state that the railroad company has submitted a proposal for the sale to the Government of the fee of this property, subject to such use of the subsurface, but that the Director of the Budget calls in question the power of the railroad company, or the present record owner, to convey the fee to any purchaser free from the restriction of its use to railroad or station purposes, or purposes incidental thereto.

After stating these facts, you request my opinion upon the following questions:

“(1) Whether the Pennsylvania Railroad and Tunnel Company, or its grantor [grantee?], has such title as will enable them to convey to the Government the fee to said property for a Post Office site, subject to an easement to use it for its railroad and station purposes.

“(2) Whether said company has the power itself to use, or to grant to any other persons or corporations or to the Government the right to use the property for purposes not connected with or incidental to the purposes named in the attached franchise.”

These questions, taken literally, are so broadly phrased that I could not give an opinion upon them without a complete abstract of the title and knowledge of other facts with which you have not furnished me. From your letter and the papers accompanying it, however, I gather that the particular question upon which you desire my opinion is the more narrow one arising from the doubts expressed by the Director of the Budget, in connection with certain appropriations to be made for the purchase of this property, with respect to the uses for which the subsidiary company is authorized to convey the land. If the subsidiary company has power to convey the land to any person for any purpose, then in proceedings to condemn the land it would be entitled to receive its fair market value, and in purchasing the land the

Government may properly pay a corresponding price. But if its power to sell the land is so limited that it can make sales only to specific classes of persons, or for limited purposes, then it could not make a sale on the open market, and in condemnation proceedings by the United States it would be entitled to receive correspondingly less compensation. It is the position of the Director of the Budget that if the power of the subsidiary to sell the land is limited, the Government should proceed to acquire the land by condemnation rather than by purchase, in order to obtain the benefit of this decreased price. This question is illustrated by the case of *Chicago, B. & Q. R. R. Co. v. Chicago*, 166 U. S. 226, where the city of Chicago brought proceedings to condemn a portion of the railroad's right of way in order to extend a public street. It was held that since the railroad was not free to convey a part of its right of way essential to its public service, it was entitled to receive as compensation only nominal damages for the requirement of joint use of the land as compared with the former sole user.

It therefore appears that the question with which you are actually concerned will be answered by a determination of the extent of the power to sell land of the Pennsylvania Railroad and Tunnel Company, or its subsidiary, under the laws of the State of New York. In answering this question I shall assume, as does the Solicitor of your Department in his opinion transmitted with your letter, (1) that the subsidiary company's title in fee to the land in question is valid; (2) that the railroad corporation and the subsidiary corporation were incorporated under, or are subject to, the New York Railroad Law of 1890, as now in effect; (3) that the conveyance of the fee, subject to the right of the railroad company to use the subsurface for the operation of its railroad and for station purposes, will not prevent or interfere with the due performance of its duties and obligations to the public.

The New York Railroad Law (N. Y. Laws 1890, c. 565), provides in section 4 as follows:

"SEC. 4. *Additional powers conferred.*—Subject to the limitations and requirements of this chapter, every railroad

corporation, in addition to the powers given by the general and stock corporation laws, shall have power:

* * * * *

"2. *Acquisition of real estate.*—To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance, and accommodation of its railroad; and to acquire by condemnation such real estate and property as may be necessary for such construction and maintenance in the manner provided by law, but the real property acquired by condemnation shall be held and used only for the purposes of the corporation during the continuance of the corporate existence."

Similar powers were granted by section 7 of the Railroad Law. These provisions are now incorporated in sections 8 and 17 of chapter 49 of the New York Consolidated Laws. It is to be noted that the limitation on a railroad corporation's power to hold and use land is confined to land "acquired by condemnation," and that, inferentially at least, there is no such limitation on its power with respect to land acquired by purchase.

By the General Corporation Law, to which reference is made in the section just quoted, it is provided (N. Y. Laws, 1929, c. 650, sec. 14; amending, without substantial change, N. Y. Laws, 1890, c. 563, sec. 8, and N. Y. Laws, 1895, c. 672, sec. 11):

"SEC. 14. Every corporation as such has power, though not specified in the law under which it is incorporated:

* * * * *

"3. To acquire property for the corporate purposes by grant, gift, purchase, devise or bequest, and to hold and to dispose of the same, subject to such limitations as may be prescribed by law."

The above-quoted provisions would seem to be sufficient to give a corporation subject to the New York Railroad Law power to dispose of land which is no longer needed by it in the conduct of its business, and such has been the interpretation of these statutes by the New York Court of Appeals. In *Matter of City of Buffalo*, 206 N. Y. 319, that court said (pp. 330-31):

"It is well settled that corporations, limited in duration, may purchase and hold the fee of land, and sell it whenever it is no longer necessary or convenient to keep it. (*Nicoll v. N. Y. & E. R. R. Co.*, 12 N. Y. 121, 129.) In the case just cited we find the general rule very succinctly stated in the language of Chancellor Kent: 'Corporations have a fee simple for the purpose of alienation, but they have only a determinable fee, for the purpose of enjoyment. On the dissolution of the corporation, the reverter is to the original grantor or his heirs; but the grantor will be excluded by the alienation in fee, and in that way the corporation may defeat the possibility of a reverter.' (2 Kent. 282.) That is the rule which has been applied in this State. (*People & Health Comrs. of N. Y. v. Mauran*, 5 Denio, 389-401; *Heath v. Burmore*, 50 N. Y. 302; *Yates v. Van De Bogert*, 56 N. Y. 526, 530.) *We can find nothing in the Railroad Law which contravenes or changes this rule.* Railroad corporations are expressly authorized to acquire 'real property, or any right, interest or easement therein,' either by purchase or condemnation, and the only limitation upon this right is that every such property right, interest or easement must be taken and used for the purpose for which a railroad corporation is organized, or for some purpose stated in the Railroad Law. (Railroad Law, § 1 [7].) It is common knowledge that railroad corporations expend large sums of money for station houses, freight depots and other buildings which are all used for railroad purposes, but in the use of which there may be fluctuations and changes which are not permissible as to a railroad right of way. A passenger station or a freight depot may be discontinued or moved for reasons of business convenience or public necessity. There can surely be no doubt that in such a case a railroad company, having a title in fee to such lands which it no longer needs, may sell and convey precisely as any individual may do. (*Italics mine.*)"

See, also, in addition to the cases cited by the court, *Kenney v. Wallace*, 24 Hun 478, and 2 Fletcher, *Cyclopedia of Corporations*, sections 1111, 1112, 1187.

It appears from the papers transmitted with your letter that in 1902 the Board of Rapid Transit Commissioners granted a franchise to a predecessor of the present railroad

company and that this franchise was approved by the Board of Aldermen of the city of New York. I do not think that the power of a railroad corporation to sell land is in any way limited by this action or by the provisions of the Rapid Transit Act (N. Y. Laws, 1891, c. 4, as amended), in pursuance of which the action was taken. That Act provides in section 11 for the organization of rapid-transit corporations; and by section 24 the powers with respect to acquisition of property are stated in terms somewhat different from those contained in sections 4 and 7 of the Railroad Law. These differences, however, are not material in so far as land acquired by purchase is concerned. Moreover, these sections of the Rapid Transit Act apparently apply only to corporations formed under that Act and do not limit the power of corporations formed under the Railroad Law.

The action of the Board of Rapid Transit Commissioners was taken under section 32 of the Rapid Transit Act, as amended by N. Y. Laws, 1902, c. 584. By this section it was provided that the Board might grant a franchise to—

“any railroad corporation now or hereafter incorporated and for the purpose so declared in its articles of association, of constructing and operating a tunnel railroad or railroads in the said city to be connected with any railroad or railroads within the State of New York or any adjoining State and thereby forming a continuous line for the carriage of passengers and property between a point or points within and a point or points without the said city.”

The situation, thus, is similar to that involved in *Hudson & Manhattan R. R. Co. v. Wendel*, 193 N. Y. 166, where the court said (p. 175):

“The railroad corporation was organized under the General Railroad Law. Upon obtaining the certificate of the board of rapid transit railroad commissioners and its acceptance of the terms, conditions and requirements thereof, the railroad corporation became possessed in addition to its already existing franchises of all the powers conferred by the Rapid Transit Act upon corporations specially formed thereunder * * *.”

I do not find anything in later amendments to the Rapid Transit Act, or in any of the laws transferring the powers and duties of the Board of Rapid Transit Commissioners to

other bodies, which has any effect on the power of a railroad corporation to convey land for which it has no further use in the conduct of its business.

I know of no decision of the New York courts involving directly the question of a railroad corporation's power to convey its property with a reservation of a right to use the subsurface for its corporate purposes. Since a railroad corporation's power to convey land does extend to that portion of its property for which it has no use in a horizontal sense, I see no reason why it may not likewise convey that portion of its land for which it has no further use vertically. So far as the United States is concerned there will be no difficulty in accepting title with a reservation of the subsurface rights, for the Deficiency Appropriation Act of March 4, 1929, c. 707, 45 Stat. 1623, 1660, making an appropriation "For acquisition of site for an annex" to the New York Post Office, provides that—

"the Secretary of the Treasury may accept title subject to the grantors reserving rights to use the subsurface for railroad purpose and necessary reservation for light and air."

As to any part of the land which was formerly a part of a public street, it is possible that other factors, including the franchise granted to the railroad company by the City of New York, may require consideration. The facts with respect to this matter do not appear in your letter, and I express no opinion upon it. Similarly, different considerations would be involved if any of the land had been acquired by the railroad by condemnation rather than by purchase. (See *Hudson & Manhattan R. Co. v. Wendel*, 193 N. Y. 166.) Since you state that the land was acquired by purchase I have not considered any question which might arise with respect to land acquired by condemnation.

I am therefore of the opinion, upon the assumptions first made, that the corporation which now owns the property has the power to convey the fee, subject to the reservations stated, to any person or corporation or to the Government, and such a conveyance need not limit the use of the property to railroad purposes.

Respectfully,

WILLIAM D. MITCHELL

To the SECRETARY OF THE TREASURY.

PENSION CLAIM OF LEWIS D. ATKINSON

As the 9th Provisional Enrolled Missouri Militia was never inducted into the Federal military service, Lewis D. Atkinson, who served ninety days or more during the Civil War in Company C of that regiment and who was honorably discharged therefrom, is not entitled to the pension rate provided under the provisions of the Act of July 3, 1926 (44 Stat. 806).

DEPARTMENT OF JUSTICE,
May 23, 1930.

SIR: I have the honor to acknowledge the receipt of your letter dated December 30, 1929, in which you request my opinion on the following questions:

"1. Are those persons who served ninety days or more in the Provisional Enrolled Missouri Militia, during the Civil War, and were honorably discharged therefrom, entitled to pension under the provisions of the Act of July 3, 1926 (44 Stat. 806) ?

"2. Are such persons who, by reason of their service in the Provisional Enrolled Missouri Militia, are in receipt of pensions under other Civil War pension laws, entitled to the increases provided by the Act of July 3, 1926 ?

"3. If, in your opinion, such persons are not entitled to pension, or to increases of pension, under the provisions of the Act of July 3, 1926, should the pensions of those of such persons who have heretofore, in the administration of the pension laws, been granted pensions, or increase of pension, under the provisions of that Act, be reduced to the amount they would be entitled to receive under other pension laws?"

The Act of July 3, 1926, c. 733, 44 Stat. 806, is entitled: "An act granting pensions and increase of pensions to certain soldiers * * * of the Civil War * * *."

Section 1 of this Act provides as follows:

"Every person who served ninety days or more in the Army, Navy, or Marine Corps of the United States during the Civil War, and who has been honorably discharged therefrom, or who, having so served less than ninety days, was discharged for a disability incurred in the service and in the line of duty, and every person who served sixty days or more in the war with Mexico, or on the coasts or frontier thereof, or en route thereto, during the war with

that nation, and was honorably discharged therefrom, *and who is now in receipt of or entitled to receive, under existing law, a pension of less than \$72 per month, shall be entitled to and shall be paid a pension at the rate of \$65 per month; that in case such person is now, or hereafter may become totally helpless or blind shall be entitled to and shall be paid a pension at the rate of \$90 per month.*" (Italics mine.)

The papers accompanying your letter disclose that the questions asked arise in connection with the claim of Lewis D. Atkinson for pension at the rate of \$90 per month under the provisions of the Act of July 3, 1926, *supra*. Mr. Atkinson served ninety days or more during the Civil War in Company C, 9th Provisional Enrolled Missouri Militia, from which service he received an honorable discharge. Satisfactory proof of his condition of helplessness has been furnished.

If Atkinson's claim is to be allowed, it is apparent that he must meet the requirements of the Act by showing that he "served ninety days or more in the Army * * * of the United States." His claim is dependent, therefore, upon a showing either (1) that Congress has by legislative enactment declared the service of the Provisional Enrolled Missouri Militia to have been in the Army of the United States for pension purposes, or (2) that his regiment, the 9th Provisional Enrolled Missouri Militia, was actually inducted into the Federal military service.

In disposing of the first point it becomes necessary to make a survey of prior Civil War pension legislation with reference to the Acts under which Atkinson was given pensionable status in order to determine the intention of Congress regarding the Provisional Enrolled Missouri Militia.

Section 4693 of the Revised Statutes, taken from section 1 of the Act of March 3, 1873, c. 234, 17 Stat. 566, known as the Invalid Pension Act, provides that the persons entitled as beneficiaries include the following:

"Any officer of the Army, including regulars, volunteers, and militia, or any officer in the Navy or Marine Corps, or any enlisted man, however employed, in the military or naval service of the United States, or in its Marine Corps, whether regularly mustered or not, disabled by reason of any wound

or injury received, or disease contracted, while in the service of the United States and in the line of duty."

Section 4722 of the Revised Statutes, taken from section 8 of the Act of March 3, 1873, *supra*, provides:

"The provisions of this Title are extended to the officers and privates of the Missouri State militia, and the provisional Missouri militia, disabled by reason of injury received or disease contracted in the line of duty while such militia was co-operating with United States forces * * *. But the pensions on account of such militia shall not commence prior to the third day of March, one thousand eight hundred and seventy-three."

It thus appears that Congress did not consider the Provisional Enrolled Missouri Militia in the Federal military service within the meaning of section 1 of the Act of March 3, 1873. That this was the understanding of Congress is especially indicated by the reference in section 8 of the Act of March 3, 1873, to the service of the militia in "co-operating with United States forces." This conclusion is also confirmed by the fact that a special provision was deemed necessary in order to grant members of this organization pensionable status under section 1 of the Act of March 3, 1873.

Section 2 of the Pension Act of June 27, 1890, c. 634, 26 Stat. 182, provides in part:

"That all persons who served ninety days or more in the military or naval service of the United States during the late war of the rebellion and who have been honorably discharged therefrom, * * * shall * * * be placed upon the list of invalid pensioners of the United States * * *."

This Act was originally construed to apply to all classes granted pensionable status under section 4693 of the Revised Statutes, and as the Provisional Enrolled Missouri Militia were given pensionable status by section 4722 of the Revised Statutes, the members of this organization were awarded pensions under this Act. This construction of the Act with reference to the Provisional Enrolled Missouri Militia was reversed by a decision of the Assistant Secretary of the Interior on the ground that this organization had never actually been enlisted in the service of the United States. (See

Senate Report 807, 53d Congress, 3d Session.) In order to prevent members of this organization from being dropped from the pension rolls, the Joint Resolution of February 15, 1895, No. 13, 28 Stat. 970, entitled "Joint Resolution to restore the status of the Missouri Militia who served during the late war," was enacted, providing as follows:

"That the provisions of the Act of June twenty-seventh, eighteen hundred and ninety, be, and are hereby, extended to include the officers and privates of the Missouri State Militia and the Provisional Missouri Militia who served ninety days during the late war of the rebellion, and were honorably discharged, and to the widows and minor children of such persons. The provisions of this Act shall include all such persons now on the pension rolls, or who may hereafter apply to be admitted thereto."

Atkinson had made application for and was granted a pension under the Act of 1890, *supra*, as of September 29, 1891. The Joint Resolution of 1895 thus prevented his being dropped from the pension rolls. Subsequently an increase in pension rate was granted him under the Act of February 6, 1907, c. 468, 34 Stat. 879. This was authorized by the Act of March 4, 1907, c. 2920, 34 Stat. 1406, which provided:

"That the benefits of the Act of February sixth, nineteen hundred and seven * * * are hereby extended to include any person who served the period of time therein specified during the late Civil War * * * and who is now or may hereafter become entitled to pension under the Acts of June twenty-seventh, eighteen hundred and ninety, February fifteenth, eighteen hundred and ninety-five * * *."

Under the provisions of section 4 of the Act of May 11, 1912, c. 123, 37 Stat. 112, 113, the claimant was granted a further increase. This section provides:

"That the benefits of this Act shall include any person who served during the late Civil War, * * * and who is now or may hereafter become entitled to pension under the Acts of June twenty-seventh, eighteen hundred and ninety, February fifteenth, eighteen hundred and ninety-five * * *."

Section 2 of the Act of May 1, 1920, c. 165, 41 Stat. 585, 586, provides:

“That every person who served ninety days or more in the Army, Navy, or Marine Corps of the United States during the Civil War, and who has been honorably discharged therefrom, * * * , or is now upon the pension rolls as a Civil War veteran * * * and who is now, or hereafter may become, by reason of age and physical or mental disabilities, helpless or blind, or so nearly helpless or blind as to require the regular personal aid and attendance of another person, shall be entitled to and shall be paid a pension at the rate of \$72 per month.”

By reason of his disabilities Atkinson was granted the rate of \$72 per month, under the provision quoted, which grants pensionable status to every person now on the pension rolls as a Civil War veteran. This language was omitted from the Act of 1926.

The question now arises where the Joint Resolution of 1895, *supra*, was intended as a legislative interpretation of the Act of 1890 giving the members of the Provisional Missouri Militia the right to be included within the meaning of the language: “In the military * * * service of the United States,” or whether this Joint Resolution of 1895 operated only to extend pensionable status to the members of the Provisional Missouri Militia, thereby giving them the benefits of the Act of 1890, which under the ruling of the Assistant Secretary of the Interior they would not otherwise have received.

I am unable to find from the language employed in the Joint Resolution of 1895 anything to indicate that Congress intended the resolution as a legislative interpretation of the Act of 1890. The language used is that the provisions of the Act of 1890 “be, and are hereby, extended” to include the Provisional Missouri Militia. This language indicates clearly an enlargement upon or addition to the terms of the Act of 1890 and not a mere legislative interpretation of that Act. It is true that in the report of the Committee on Invalid Pensions to the House of Representatives (House Report 1734, 53d Congress, 3d Session) it was stated that “The purpose of this resolution is to give a rule of con-

struction for the Act approved June 27, 1890. * * * This language in the Committee Report, however, can not prevail against the clear language of the Joint Resolution itself. This conclusion is confirmed by subsequent pension legislation. It has been shown that in the Acts of February 6, 1907, and May 11, 1912, *supra*, it was deemed necessary to make specific provision for those persons benefiting under the Joint Resolution of 1895 in order to include the members of the Provisional Missouri Militia in the benefits of the later Acts.

I therefore conclude that Congress has not declared by legislative enactment that the service of the Provisional Enrolled Missouri Militia was in the Army of the United States for pension purposes.

The second matter for inquiry is whether the 9th Provisional Enrolled Missouri Militia was actually inducted into the Federal military service.

It is well settled that the word "served," as used in statutes relating to the military system applies only to those persons who have actually been mustered into the service. Attorney General Knox in 24 Op. 651, 660, in considering the question as to "What is necessary to induct militia into the service of the United States under a call by the President" referred to a regulation of the War Department in effect during the Civil War which provided as follows:

"1580. Before militia are received in the service of the United States, they shall be mustered by an inspector-general, or some other officer of the Regular Army, specially designated to muster them."

It was then stated (p. 661) that—

"the uniform practice of the War Department, covering a period of more than half a century, has been to regard such militia as not in the actual military service of the United States until the date of muster in, and such practice, in my judgment, is amply supported by the decisions of the Supreme Court, and by the opinions of the Attorneys-General. *Houston v. Moore*, 5 Wheat. 1; *Martin v. Mott*, 12 Wheat. 19; *Story on the Constitution*, sec. 1213; 3 Opin. 530, 691; 10 Opin. 100; 16 Opin. 150, 152; 21 Opin. 130; 23 Opin. 406."

See also 36 Op. 145.)

In order to determine whether the 9th Regiment of the Provisional Enrolled Missouri Militia, of which the claimant was a member, "served" within the meaning of that word in section 1 of the Act of 1926, *supra*, it is necessary, consequently, to determine whether the organization was ever mustered into the Army of the United States. The War Department, in response to a Senate Resolution passed June 14, 1902, compiled all the data relative to the history of this organization and that of all other classes of Missouri militia, in a letter printed as Senate Document 412, 57th Congress, 1st Session. The history of the Provisional Enrolled Missouri Militia is there stated as follows (pp. 85, 86) :

"The members of the Provisional Regiments, Enrolled Missouri Militia, organized under the authority of the Governor of the State on February 3, 1863, were (officers and enlisted men) simply detailed from the regiments of Enrolled Missouri Militia, and their military status was precisely the same as that of the original force. They were Missouri Militia organized under the militia law of the State for State service, were paid by the State, and while on duty under the command of the United States officers were clothed and subsisted by the United States. Like the original force, they served in defense of the State of Missouri and incidentally in defense of the United States * * * .

"With the exception of the Sixth and Seventh Regiments, whose muster into the United States service has been referred to, none of the Provisional Regiments of Enrolled Missouri Militia was in the military service of the United States. * * * "

It is further stated (p. 83) that on September 26, 1863, all the militia of the State, whether in the active service or not, were placed by the Governor under the command of General Schofield, Federal Military Commander of the Department of the Missouri.

On considering all the facts relative to its organization and service, with special reference to the fact that this organization was not subject to general orders for duty outside the State, and was never, with the exception of the 6th and 7th Regiments, mustered into the Army of the

United States, it is my conclusion that the service of the 9th Provisional Enrolled Missouri Militia was not in the Army of the United States. It is therefore my opinion that Lewis D. Atkinson's service in the Provisional Enrolled Missouri Militia was not in the Army of the United States within the meaning of section 1 of the Act of July 3, 1926, *supra*, so as to entitle him to the pension rate provided therein.

Your questions are general in form and apply generally to all persons who served ninety days or more in the Provisional Enrolled Missouri Militia during the Civil War and were honorably discharged therefrom. This opinion must be understood as limited to the case of Lewis D. Atkinson, whose service was in the 9th Provisional Enrolled Missouri Militia, which was one of the regiments which was not mustered into the service of the United States. You have not advised me whether the other members of this militia organization who are in receipt of pensions are similarly situated, and I must therefore refrain from venturing an opinion responsive to your questions except in regard to the facts presented in the case of Lewis D. Atkinson.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE INTERIOR.

PORTO RICO—LEGALITY OF BOND ISSUE

The proposed issue by the Government of Porto Rico of bonds in the sum of \$4,000,000, being authorized by Congress and by Act No. 5 of the Legislature of Porto Rico, approved April 9, 1930, and all of the statutory requirements concerning the issue and sale of these bonds having been complied with, said bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of The People of Porto Rico.

DEPARTMENT OF JUSTICE,

May 24, 1930.

SIR: I have the honor to comply with your request of May 12, 1930, as subsequently amended, for my opinion concerning the validity of a proposed issue of bonds, for the

Government of Porto Rico, of the face value of \$4,000,000, in the form and denomination and for the purposes hereinafter indicated.

Section 3 of the Act of Congress approved March 2, 1917, entitled "An Act to provide a civil government for Porto Rico, and for other purposes," as amended by the Act of March 4, 1927 (c. 145, 39 Stat., 951, 953; c. 503, 44 Stat. 1418; U. S. C. Title 48, Sections 741, 745), provides:

"* * * and when necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Porto Rico or any municipal government therein as may be provided by law, and to protect the public credit: *Provided, however,* That no public indebtedness of Porto Rico and the municipalities of San Juan and Ponce shall be allowed in excess of 10 per centum of the aggregate tax valuation of its property * * *. In computing the indebtedness of the people of Porto Rico, municipal bonds for the payment of interest and principal of which the good faith of the people of Porto Rico has heretofore been pledged and bonds issued by the people of Porto Rico secured by bonds to an equivalent amount of bonds of municipal corporations or school boards of Porto Rico shall not be counted, but all bonds hereafter issued by any municipality or subdivision * * * for which the good faith of the people of Porto Rico is pledged shall be counted."

You state that the records of your Department show that the aggregate assessed valuation of real and personal property in Porto Rico on June 30, 1929, amounted to \$344,865,104; that on April 10, 1930, there were outstanding bonds of the Government of Porto Rico of the face value of \$25,390,000, of which \$492,000 is secured by an equal amount of bonds of municipal corporations and school boards and, under the Act of Congress, is not to be counted when ascertaining the total bonded indebtedness which the Government of Porto Rico is authorized to incur; that since the amendatory Act of March 4, 1927, the good faith of the People of Porto Rico has been pledged to the payment of principal and interest on municipal bonds aggregating \$1,361,500, which must be added to the foregoing, making a total of \$26,259,500 to be considered when issuing

further bonds. Therefore, it is apparent that the proposed issue will not increase the bonded indebtedness of the Government of Porto Rico beyond 10 per cent of the aggregate assessed valuation, the maximum permitted by law.

The proposed issue is authorized by Act No. 5 of the Legislature of Porto Rico, approved April 9, 1930, which recites that it is of an "urgent character," was passed by a vote of more than two-thirds of all the members elected to each house of the Legislature, and therefore became effective immediately after its approval as directed by section 18 thereof, in accordance with section 34 of the Act of Congress of March 2, 1917, *supra* (U. S. C. Title 48, section 827). *Diaz Cintron v. People of Porto Rico*, 24 F. (2d) 957, 959.

Section 1 of the said Act of the Legislature provides as follows:

"The Treasurer of Porto Rico is hereby authorized and empowered, with the approval of the Governor of Porto Rico, to issue bonds of The People of Porto Rico up to the sum of four million (4,000,000) dollars, at a rate of interest not to exceed four and one-half ($4\frac{1}{2}$) per cent. a year."

Section 2 directs that the proceeds of the bond issue be applied to the payment of pending balances (definitely stated) on previous loans, to meet a probable deficit in Insular revenue receipts, and to liquidate obligations contracted on account of transactions of the Insular Government for the fiscal year ending June 30, 1930, any unexpended balance to be covered into the Insular Treasury as a reserve fund available for future emergencies or to refund special funds for transfers made during the fiscal year 1924-1925.

Other sections provide that the bonds shall be issued in ten separate series of \$400,000 each, to mature respectively on July 1 of each year, 1931 to 1940 inclusive, and shall be in coupon form of the denomination of \$1,000 each, to be dated either January 1 or July 1 of the year of issue; that the interest thereon at the above-stated rate shall be payable semiannually on January 1 and July 1 of each year, both principal and interest to be payable in United States currency; and for the payment thereof the good faith of The People of Porto Rico is irrevocably pledged. A special tax is levied, the proceeds to constitute a fund for the pay-

ment of the bonds as they mature; and provision is made for the payment of interest.

It is further provided that the bonds shall be sold by the Secretary of War of the United States, or by the Treasurer of Porto Rico, or by any fiscal agent appointed for the purpose by the Treasurer with the approval of the Governor, and shall be sold on the terms most favorable to The People of Porto Rico, as near the date of issue as possible, the sale to be made on public call for bids and award to be made to the best bidder. The Treasurer of Porto Rico, with the approval of the Governor and within the limitations prescribed by the Act, is given entire charge and authority with respect to all details, including the time of issue and sale of the bonds.

The Treasurer, with the approval of the Governor, has determined that they shall be dated July 1, 1930, with interest and principal payable at the Treasury of the United States, and shall be sold by the Secretary of War, the other terms and conditions of substance being prescribed by the Act of the Legislature, as above indicated; and you have been duly requested to issue and sell the bonds in accordance therewith.

I have examined the proposed form of bond submitted by you and find that it accords with the directions of the Legislature and the determinations of the Treasurer. It properly recites that "Under the Provisions of Section 3 of the Act of Congress, approved March 2, 1917, as amended by the Act of March 4, 1927, this bond is exempt from taxation by the Government of the United States, or by the Government of Porto Rico or of any political or municipal subdivision thereof, or by any State, Territory, or possession, or by any county, municipality, or other municipal subdivision of any State, Territory, or possession of the United States, or by the District of Columbia."

It is my opinion that all the statutory requirements concerning the issue and sale of the bonds have been complied with and that they will, when issued in the amount and form proposed, constitute valid and binding obligations of The People of Porto Rico.

Respectfully,

WILLIAM D. MITCHELL,

To the SECRETARY OF WAR.

141183°—32—VOL 36—17

IMPORTATION OF TROPACOCAINE HYDROCHLORIDE

Tropacocaine hydrochloride, even though manufactured synthetically from a substance other than opium, coca leaves, or cocaine, is a narcotic drug within the meaning of the Narcotic Drugs Import and Export Act and hence can not be lawfully imported into the United States or any territory under its control or jurisdiction.

DEPARTMENT OF JUSTICE,

June 2, 1930.

SIR: I have the honor to respond to your request of January 18th last for my opinion upon certain questions which, together with the facts out of which they arise, are thus set forth in the opinion upon the subject rendered to you by the Solicitor of the Treasury, copy of which opinion you transmit with your request:

"On August 1, 1929, there were seized by the Customs Bureau at Philadelphia, under authority of the Narcotic Drugs Import and Export Act and regulations thereunder ten boxes of ten ampoules each of tropacocaine hydrochloride. This preparation was contained in a package addressed to Dr. R. J. Behan, of Pittsburgh, and was shipped from E. Merck, Darmstadt, Germany. The consignee of this shipment has urgently requested that it be released to him, claiming that the contents are to be used for spinal anaesthesia and that they may not be considered as forfeitable under the Narcotic Drugs Import and Export Act and regulations thereunder. In support of his contention he submits a document purporting to be a copy of a letter from the German manufacturer indicating that the article is not a derivative of cocaine and the report of the Appraiser's laboratory indicates that the sample submitted to it is 'tropacocaine hydrochloride solution, a coal-tar medicinal made in part from benzoyl chloride' and that 'it is not a narcotic drug as defined in T. D. 39154 and 39308 since it is not opium, coca leaves, cocaine, or any salt, derivative or preparation of opium, coca leaves, or cocaine.' The decision of this Department, originally made prior to the receipt of a detailed report on the matter, was that the shipment be detained and forfeited in the usual manner under the Narcotic Drugs Import and Export Act and regulations. This decision was based upon information obtained from the

United States Dispensatory, 20th Edition, page 1649, which describes tropacocaine as benzoyl-pseudotropeine and states that the compound was isolated from a narrow-leaved coca plant from Java. The shipment is now in customs custody awaiting a final decision as to its admissibility into the United States.

* * * * *

"It is believed that there is no question that tropacocaine as derived from coca leaves falls within the inhibition of the law and regulations cited. Assuming, however, that the shipment of tropacocaine hydrochloride can be shown by proper evidence to have been prepared synthetically, in making a determination of whether the substance is admissible into the United States it would appear to be necessary to consider three questions. First, under the definition of cocaine as contained in the regulations can tropacocaine hydrochloride be excluded upon the ground that it reacts chemically to the usual tests for cocaine? As to this there seems to be a conflict of scientific opinion, although the Assistant Chief of the Food, Drug, and Insecticide Administration claims that 'There would be material differences in such characteristics as melting point, the optical properties, crystal form, etc.'

"Secondly, under the same assumption, does tropacocaine fall within the definition of a derivative as set forth in the regulations previously quoted?

"Thirdly, even though tropacocaine hydrochloride may be synthetically prepared, may it be excluded from entry into the United States on the theory that it is a derivative of coca leaves within the meaning of Section 1 (a) of the act regardless of the administrative definition of the term derivative as contained in Article 1 (d) of the regulations, having in mind the holding of the Attorney General in his opinion of January 15, 1909, copy of which is also enclosed. It may be mentioned that this opinion of the Attorney General was mentioned by the Supreme Court in the case of the *United States v. Antikamnia Chemical Company*, 231 U. S. 654. I should be glad to receive the benefit of your opinion upon these three questions to aid in determining whether the shipment now under seizure should be declared forfeited to the United States or released to the claimant."

While your first two questions relate to the application of certain regulations promulgated by the Federal Narcotics Control Board, I find it unnecessary to pass upon their scope or validity, for the reason that the Narcotics Drugs Import and Export Act, here drawn in issue, contains its own definitely prescribed prohibition against importation of narcotic drugs, and also specifically defines what the term "narcotic drug" shall embrace. A regulation could neither add to nor delimit the reach of the statute. Unless the statute forbids entry of the narcotic drug about which you inquire, that result, however desirable, could not be brought about by the promulgation of a regulation. Nor could a regulation permit entry of a drug which the statute forbade. *United States v. Antikamnia Co.*, 231 U. S. 654, 666.

The provisions of the Narcotic Drugs Import and Export Act of May 26, 1922, c. 202, 42 Stat. 596 (U. S. C. Title 21, secs. 171 et seq.), amending certain previous Acts, and which it is essential to consider in the solution of the dominant question you submit, viz, your third one, are the following:

"SEC. 1. That when used in this Act—

"(a) The term 'narcotic drug' means opium, coca leaves, cocaine, or any salt, derivative, or preparation of opium, coca leaves, or cocaine * * *.

"SEC. 2. * * *

"(b) That it is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe. * * *

* * * * *

"SEC. 6. (a) That it shall be unlawful for any person subject to the jurisdiction of the United States Government to export or cause to be exported from the United States, or from territory under its control or jurisdiction, or from countries in which the United States exercises extraterritorial jurisdiction, any narcotic drug to any other country: *Provided*, That narcotic drugs (except smoking opium and

opium prepared for smoking, the exportation of which is hereby absolutely prohibited) may be exported to a country only which has ratified and become a party to the convention and final protocol between the United States Government and other powers for the suppression of the abuses of opium and other drugs, commonly known as the International Opium Convention of 1912, and then only if (1) such country has instituted and maintains, in conformity with that convention, a system, which the board deems adequate, of permits or licenses for the control of imports of such narcotic drugs; (2) the narcotic drug is consigned to an authorized permittee; and (3) there is furnished to the board proof deemed adequate by it, that the narcotic drug is to be applied exclusively to medical and legitimate uses within the country to which exported; that it will not be reexported from such country, and that there is an actual shortage of and a demand for the narcotic drug for medical and legitimate uses within such country.

“(b) The Secretary of State shall request all foreign Governments to communicate through the diplomatic channels copies of the laws and regulations promulgated in their respective countries which prohibit or regulate the importation and shipment in transit of any narcotic drug and, when received, advise the board thereof.

“(c) The board shall make and publish all proper regulations to carry into effect the authority vested in it by this Act.”

The drugs covered by the Act are in part specifically named (“opium, coca leaves, cocaine”), but by far the greater number of them are referred to under a general classification (“any salt, derivative or preparation of opium, coca leaves or cocaine”). Section 1 (a), *supra*. A similar method of designating drugs generically was employed by Congress in the enactment of the Food and Drugs Act, 34 Stat. 768, 770. The International Opium Convention of 1912 adopts the same method. Articles 9, 10, 14, *post*, page 8. It was not reasonably practicable for Congress to set up in the statute an exhaustive enumeration of the salts, derivatives and preparations of the drugs named, which might then have existed (actually running into the hundreds, according to reliable information), and much less so, to

anticipate those which might later be discovered and produced. Such an enumeration would have been subject to technical inaccuracies and omissions and would have required constant amendment to keep it abreast with chemical progress. These reasons of practical convenience, in my opinion, sufficiently account for the use of the generic designation of drugs in the definition of the term "narcotic drug" in section 1 (a); and exclude the hypothesis that drugs named generically should be treated differently from drugs named specifically.

The general expression "any salt, derivative, or preparation" of the drugs named is no less definite than a specific enumeration, on the familiar principle that that is certain which may be made certain. The ascertainment of these salts, derivatives, and preparations is a matter of technical detail that could properly be confided to an administrative officer or board. There seems to be no question that a chemist setting up a list of the salts, derivatives, and preparations of "opium, coca leaves, or cocaine" would include tropacocaine hydrochloride. United States Dispensatory, 20th Edition, p. 1649; Merck's Index, 4th Edition, 1930, p. 532.

But the importer of the ten boxes of tropacocaine hydrochloride involved in your question contends that this particular tropacocaine hydrochloride is not "any salt, derivative, or preparation of opium, coca leaves, or cocaine." The contention appears to rest on the assumption that the word "derivative," occurring in section 1 (a) of the Act, is to be given its popular, not its chemical, meaning; and therefore only drugs that have been produced or obtained in fact from opium, coca leaves, or cocaine are embraced in the term "narcotic drug," as defined in that section; that the particular quantity of tropacocaine hydrochloride here in question, which is said to be "a coal-tar medicinal made in part from benzoyl chloride," is not a "narcotic drug," since it is not a derivative of opium, coca leaves, or cocaine in the popular sense of having been actually produced or obtained therefrom.

It may be urged that the word "derivative" should be given its popular meaning, under the ruling in the case of *Lowe v. Farbwerke-Hoechst Co.*, 240 Fed. 671, which in-

volved an interpretation of that word occurring in the Harrison Narcotic Act of December 17, 1914, 38 Stat. 785. The drug there involved was novocaine, a coal-tar product. The court held in substance that the Harrison Act was a revenue measure or tax law and is to be construed as such even though it "has a moral end as well as revenue in view." *United States v. Jin Fuey Moy*, 241 U. S. 394, 402. Therefore it was held that the word "derivative" is to be taken in its commonly received or popular sense as distinguished from special or scientific usage (citing *Farbenfabriken v. United States*, 102 Fed. 603) and that unless the Government was prepared to show that novocaine was a derivative of coca leaves "in the ordinary practical, commercial sense of that word," the importer was not liable for the tax levied by the Harrison Act.

It is to be observed, however, that the basis of the decision in *Lowe, Collector v. Farbwerke-Hoechst Co.*, *supra*, namely, that the statute there involved must be construed as a revenue act, has no application to the Narcotic Drugs Import and Export Act here involved. The latter Act is in no sense a revenue measure or tax law. Therefore we are not precluded by that decision from interpreting the words used in the latter Act in a special and scientific sense, which would be consistent with the purposes of the Act and which would aid in giving it full effect.

The purpose of the statute is twofold: First, in the exercise of the power to regulate foreign commerce, Congress enacted the statute to restrict and control the traffic in certain dangerous and noxious drugs; and, second, as appears on its face, and in the statements of the Chairmen of the House and Senate Committees, respectively, in charge of the Bill (Cong. Rec., Vol. 62, 67th Congress, 2nd Sess., pp. 6333-6334, and p. 6834), the statute was enacted to execute the obligations imposed by the International Opium Convention of 1912 (38 Stat., Part 2, p. 1929). Its terms should therefore be given such susceptible construction as will most nearly give effect to the intent and purpose of Congress and to conform to the terms and spirit of the International Opium Convention.

That Convention contains the following provisions:

“CHAPTER III

“*Medicinal Opium, morphine, cocaine, etc.*

“*Definitions.* By medicinal opium shall be understood:

raw opium which shall have been heated to 60 degrees centigrade whether or not powdered or granulated, or whether or not mixed with neutral substances, and which shall not contain less than 10% of morphine.

“By morphine shall be understood:

the principal alkaloid of opium, expressed by the chemical formula $C_{17}H_{19}NO_3$.

“By cocaine shall be understood:

the principal alkaloid of the leaves of *Erythroxylon Coca*, expressed by the formula $C_{17}H_{21}NO_4$.

“By heroin shall be understood:

morphine-diacetylate, expressed by the formula $C_{21}H_{28}NO_6$.

“Article 9

“The Contracting Powers shall enact pharmacy laws and regulations in such a way as to limit the manufacture, the sale and the use of morphine, cocaine and their respective salts to medical and legitimate uses only, unless existing laws or regulations have already regulated the matter. They shall cooperate amongst themselves in order to prevent the use of these drugs for any other purpose.

“Article 10

“The Contracting Powers shall use their best efforts to control, or to cause to be controlled, all those who manufacture, import, sell, distribute and export morphine, cocaine and their respective salts, * * *

* * * * *

“Article 14

“The Contracting Powers shall apply the laws and regulations for the manufacture, importation, sale or exportation of morphine, cocaine, and their respective salts:

“*a.* to medicinal opium;

“*b.* to all preparations (official and nonofficial, including the so-called anti-opium remedies) containing more than 0.2% of morphine or more than 0.1% of cocaine;

“*c.* to heroin, its salts and preparations containing more than 0.1% of heroin;

“*d.* to every new derivative of morphine, cocaine or their respective salts or to any other alkaloid of opium which might after generally recognized scientific investigations give rise to similar abuse and to result in the same injurious effects.”

The words “salts” and “derivative” are used in the foregoing provisions of the Convention in connection with and in relation to precisely stated chemical formulas. In the light of their context, therefore, those words in the Convention are to be understood in their chemical sense. The same words occurring in a statute enacted to give effect to that Convention may reasonably be deemed to have been used in the same sense.

That those words occurring in the Narcotic Drugs Import and Export Act were used in their chemical sense seems clear in the light of the nature of the substances dealt with in the Act. In this connection a parallel may be drawn with the Food and Drugs Act, which was involved in the case of *United States v. Antikamnia Co.*, 231 U. S. 654. The reasoning of the Court in that case (p. 666) is applicable here:

“The fact that a council of three Secretaries of governmental departments was given power to make rules and regulations for the execution of the law shows how complex the matters dealt with were considered to be, and the care that was necessary to be taken to guard against their defeat or perversion. The composition of drugs is a matter of technical skill, their denomination often by words of scholastic origin, conveying no meaning to the uninformed, their uses and abuses learned only by experience, beneficial or evil. It was this experience that the law sought to avail itself of and to avail itself against the ever-increasing powers of the laboratory or the disguises of a technical nomenclature. Hence the provision of the law that the term ‘drug’ as used in the act shall include all medicines and preparations recognised in the United States Phar-

macopœia or National Formulary for internal or external use, and hence also the provision that a drug or food product is misbranded in case it fails to bear a statement on the label of the quantity or proportion of certain enumerated substances, including acetanilid, 'or any derivative or preparation of any such substance contained therein.' Experience had demonstrated the quality of those substances; their effects had become common knowledge; their names, therefore, were all the warning it was necessary for the law to give. But derivatives of them might, probably would, be of their quality, so derivatives of them were to be guarded against, and the law hence further provided that the labels on them should state the 'quantity or proportion' of 'any derivative or preparation' of them. This much is clear—there is no obscurity in the words and purpose of the law.

* * *

The ruling in 27 Op. 143, is, in my judgment, controlling here. One of the questions there considered was as follows: "Is acetphenetidine a derivative of acetanilid within the meaning of section 8 of the Food and Drugs Act." The memoranda submitted to my predecessor in that matter show that acetphenetidine can be obtained from acetanilid but that commercially the drug is obtained from phenol. It was stated that "the price of acetanilid, as compared with phenol, is absolutely prohibitive as a commercial proposition."

In the course of his discussion of the question, my predecessor said (pp. 147-148):

"* * * I think the substantive 'derivative' in the second subsection of section 8 of the food and drugs act may be reasonably, and, indeed, ought to be, understood in its chemical sense. The said subsection provides that a drug shall be deemed to be misbranded, 'if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilid, or any derivative or preparation of any such substances contained therein.'

"I have reached this conclusion mainly for two reasons. The word itself is seldom used in its general and popular meaning and is ordinarily employed in one or the other of

certain technical senses relating habitually either to grammar, music, medicine, mathematics, or chemistry. Secondly, it is employed here only with respect to various drugs, and may be appropriately understood as those called upon to deal in drugs would naturally understand it. The chemical definition of 'derivative' is thus given in Webster's International Dictionary:

"A substance so related to another substance by modification or partial substitution as *to be regarded as* derived from it; thus, the amido compounds are *derivatives* of ammonia, and the hydrocarbons are *derivatives* of methane, benzene, etc."

"The corresponding definition of the verb 'derive' is:

"To obtain one substance from another by actual *or* theoretical substitution; as to *derive* an organic acid from its corresponding hydrocarbon."

"Applying this definition to the subject matter of discussion, I can answer your first question only by saying that, in my opinion, acetphenetidine is to be considered a 'derivative' of acetanilid, if it is so related to the latter substance that it would be rightly regarded by recognized authorities in chemistry as obtained from the latter 'by actual or theoretical substitution'; and it is not indispensable that it should be actually produced therefrom as a matter of fact."

The statement last above quoted is explicitly supported by the chemical definition of "derivative" given in the latest edition of Webster's International Dictionary (1925), which is as follows:

"6. *Chem.* A substance so related to another substance by modification or partial substitution as to be regarded as derived from it, *even when not obtainable from it in practice*; thus, the amido compounds are *derivatives* of ammonia; toluene, $C_6H_5CH_3$, is a methyl *derivative* of benzene C_6H_6 (that is, it may be regarded as benzene in which methyl has been substituted for a hydrogen atom)."

The opinion quoted above appears to have been approved in *United States v. Antikamnia Co.*, 231 U. S. 654, 662-663.

As in the Food and Drugs Act, the word "derivative" in the Federal Narcotic Drugs Import and Export Act is employed "with respect to various drugs and may be ap-

propriately understood as those called upon to deal in drugs would naturally understand it." If, as seems to be uncontroverted, tropacocaine hydrochloride, as a matter of scientific definition, is a "salt, derivative, or preparation of opium, coca leaves, or cocaine," using those terms in their chemical sense, any specific quantity of that drug is a "narcotic drug" within the meaning of the statute. It is not indispensable that it should be actually produced or derived, in the commercial or popular sense, from opium, coca leaves, or cocaine in order to bring it under the ban of the statute.

These conclusions seem to be fortified by the way the statute would apply in the case of cocaine. Cocaine is included by name in the definition of a "narcotic drug." Section 1 (a). No distinction is made in the Act between cocaine which occurs in nature as an alkaloid in coca leaves and cocaine which may be manufactured synthetically from a different substance. Since synthetic cocaine is a "narcotic drug" that falls under the ban of the statute, it is a fair inference that Congress intended a like result in the case of synthetic substitutes for the other drugs that admittedly fall under the ban of the statute. It does not militate against this inference that such other drugs are not specifically referred to in the Act by name. They are identified just as definitely as if they had been named and there is no reason to believe that Congress intended that drugs named generically should be treated any differently from drugs named specifically. It is not denied that tropacocaine hydrochloride is a "narcotic drug" if it is produced from coca leaves or cocaine. Tropacocaine hydrochloride that is produced from other substances is none the less tropacocaine hydrochloride. There would be no question that the ten boxes of the drug involved in your question would fall under the ban of the statute if tropacocaine hydrochloride, like cocaine, had been specifically named. In my opinion the statute should be construed as if it were specifically named.

The principle applicable here is that all laws are to be given a sensible construction. A construction or literal application of a statute which would lead to absurd conse-

quences should be avoided whenever a reasonable construction or application can be given to it consistent with the legislative purpose. *United States v. Katz*, 271 U. S. 354, 357; *Hawaii v. Mankichi*, 190 U. S. 197, 212. Cf. also *Danovitz v. United States*, 281 U. S. (decided May 5, 1930).

The construction advanced by the claimant, if adopted, would lead to difficulties of administration, evasions and frustration of the statute, and absurd consequences. Tropacocaine hydrochloride may be actually and physically derived from coca leaves or cocaine and possibly coal tar or some other substance as the source or starting point. Yet when created it is impossible, so I am informed, to determine by an examination of the finished product from which substance it was actually produced. Primary evidence of the method of production of narcotic drugs offered for import would generally have to be obtained abroad, or secondary evidence of facts peculiarly within the knowledge of the manufacturer would have to be accepted without adequate means of verification. If, to take only one narcotic as an example, tropacocaine hydrochloride that is obtained from coal tar could be imported without restriction and only tropacocaine hydrochloride that is obtained from coca leaves or cocaine should be excluded, it is obvious that the purpose of the statute would be frustrated. Such an interpretation would lead to the apparently absurd result that of two shipments of a drug which are indistinguishable, one would fall under the ban of the statute and the other be exempt.

The following expressions of the Supreme Court relating to the Food and Drugs Act in the case of *United States v. Antikamnia Co.*, *supra*, pages 667-668, are pertinent here:

"The purpose of the law is the ever insistent consideration in its interpretation. The purpose is to prevent the surreptitious sale of certain noxious drugs or their derivatives, the latter supposedly partaking of the quality of parent article and as effective of evil consequences. This being the purpose, did the law leave it unexecuted? We can not attribute to it such defect, and a serious defect it might be. Nor can we consider as a case of omission that which involves so definitely the mischief which was intended

to be redressed and which is fairly within the language of the law."

For the reasons stated, I have the honor to advise you that the restrictive interpretation of the Act advanced by the claimant should be rejected, and that even if the data furnished by the claimant proved that the specific quantity of tropacocaine hydrochloride, to which your question relates, was not in fact obtained from opium, coca leaves, or cocaine, it would nevertheless be unlawful to import the same into the United States or any territory under its control or jurisdiction.

The conclusions herein reached seem to require an amendment of Article 1 (d) of the Regulations approved by the Federal Narcotic Control Board which took effect on April 1, 1928.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE TREASURY.

CONTRACTS UNDER BOULDER CANYON PROJECT ACT.

The contract for lease of power privilege, under section 4 (b) of the Boulder Canyon Project Act (45 Stat. 1059), herein set forth, between the United States, the City of Los Angeles, its Department of Water and Power, and the Southern California Edison Company, Ltd., is a valid agreement which is binding upon the said Edison Company, and also upon the City of Los Angeles and its said department to the extent to which funds are available under the provisions of the charter to that department.

All the requirements of section 4 (b) of the Boulder Canyon Project Act which are made conditions precedent to the appropriation of money, the making of contracts, and the commencement of work for the construction of a dam and power plant in Boulder Canyon have been fully met and performed by the Secretary of the Interior in securing contracts which in his judgment are adequate for the purposes specified in said section of the Act.

DEPARTMENT OF JUSTICE,

June 9, 1930.

SIR: I have the honor to acknowledge receipt of your communication of June 6, 1930, transmitting a letter dated June 6, 1930, from the Secretary of the Interior, advising that, as required by section 4 (b) of the Boulder Canyon

Project Act (45 Stat. 1057), a contract has been secured with the City of Los Angeles, its Department of Water and Power, and the Southern California Edison Company, Ltd., which will provide revenue adequate in his judgment to pay operation and maintenance costs and insure the repayment to the United States within fifty years from the completion of the dam, power plant and related works, of all amounts to be advanced for the construction of such works, together with the interest thereon made reimbursable by the Act, and that in addition two contracts have been secured with the Metropolitan Water District of Southern California which will provide additional revenues for such purpose, and requesting that the opinion of the Attorney General be obtained as to whether or not these contracts comply with all the requirements of section 4 (b) of the Boulder Canyon Project Act which are by that section made conditions precedent to the appropriation of money, the making of contracts and the commencement of work for the construction of a dam and power plant in Boulder Canyon.

Responsive to your request for my opinion upon these questions, I have the honor to advise you as follows:

Section 4 (b) of the Boulder Canyon Project Act provides:

“(b) Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the provisions of this Act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this Act.”

The contracts in question are:

(1) A contract dated April 26, 1930, between the United States of America and the City of Los Angeles and the Southern California Edison Company, Ltd., entitled “Contract for Lease of Power Privilege” as amended by supplemental contract dated May 28, 1930.

(2) A contract dated April 26, 1930, between the United States of America and the Metropolitan Water District of Southern California, entitled "Contract for Electrical Energy, as amended by a supplemental Contract dated May 31, 1930."

(3) A contract dated April 24, 1930, between the United States of America and Metropolitan Water District of Southern California, entitled "Contract for Delivery of Water."

The "Contract for Lease of Power Privilege," as amended, recites:

"(1) This contract, made this 26th day of April, 1930, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388) and acts amendatory thereof and supplementary thereto all of which acts are commonly known and referred to as the Reclamation Law and, particularly, pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057) designated the Boulder Canyon Project Act, between the United States of America, hereinafter referred to as the United States, acting for this purpose by Ray Lyman Wilbur, Secretary of the Interior, hereinafter styled the Secretary, and severally, the City of Los Angeles, a municipal corporation and its Department of Water and Power (said department acting herein in the name of the City but as principal in its own behalf as well as in behalf of the city; the term city as used in this contract being deemed to mean both the City of Los Angeles and its Department of Water and Power) and the Southern California Edison Company, Ltd., a private corporation, hereinafter styled the company, both of said corporations being organized and existing under the laws of the State of California and hereinafter styled the lessees:"

The original and supplemental contracts for lease of power privilege were executed in the name of the City of Los Angeles, acting by and through its Board of Water and Power Commissioners, by the President of the Board. The supplemental contract contains a recital that it was the intention that the Department of Water and Power of the City of Los Angeles, as well as the City of Los Angeles, should be firmly bound as principals by the original con-

tract of April 26, 1930, and the parties adopt and reaffirm the original contract as amended. The Department of Water and Power Commissioners, by the President of the Board, executed the supplemental contract.

There have been submitted to me certified copies of resolutions adopted by the Board of Water and Power Commissioners, and of resolutions and ordinances adopted by the council of the City of Los Angeles authorizing the execution of these contracts. Section 386 of the charter of the City of Los Angeles provides that contracts shall not be made without advertising for bids; but this section does not apply to contracts such as those here in question relating to a matter about which there is no competition and where advertising for bids would have been futile. *Los Angeles Gas & Electric Corp. v. City of Los Angeles*, 188 Cal. 307, 319. In my opinion the ordinances and resolutions were sufficient to authorize the President of the Board of Water and Power Commissioners to execute the contracts.

In substance the contract as amended imposes upon the city acting by and through its Department of Water and Power, and therefore upon the Department itself—*First*: The obligation, when the dam is completed and the generating equipment has been installed by the Government, to take over as lessee the generating plant and operate it, paying as rental in ten annual installments the cost to the United States of the generating equipment, with interest at four per cent. *Second*: The obligation to pay for electrical energy, as furnished, at stated rates. *Third*: An obligation to operate and maintain at cost the transmission lines required for transmitting power to the pumping plants of the Metropolitan Water District, and to transmit over its main transmission line the power allocated to others, for compensation based on a reasonable share of the cost of construction, operation, and maintenance. As none of the transmission lines have been built, performance of these obligations will require their construction.

Under the provisions of the charter of the City of Los Angeles the Department of Water and Power is specifically authorized to construct, operate, maintain, extend, manage, and control works and property for the purpose of supplying the city and its inhabitants with water and electric

energy. To this department of the city government is entrusted full responsibility and control in entering into such contracts as those here involved. Quite in conformity with the charter provisions the city, in its execution of the original and supplemental contracts for lease of power privilege, is described as acting by and through its Board of Water and Power Commissioners. The contract as amended is therefore to be regarded as made in the name of the city, but subject to all of the provisions of the charter of the City of Los Angeles relating to contracts executed by the Department of Water and Power, and the question of the validity of this contract and the character of the resources available to secure its performance must be determined from a consideration of the power of the Board of Water and Power Commissioners of the Department of Water and Power to make such a contract, and the sufficiency of the resources of the city, which are specifically allocated under the terms of the charter to its control and expenditure in the performance of the obligations of such contracts.

Under the charter of the City of Los Angeles revenues for such purposes as those contemplated by these contracts are provided through the operations of the Department of Water and Power, which, although an entity separate from the city for some purposes (*Shelton v. City of Los Angeles*, 275 Pac. 421) is a department of the city government. Its revenues are revenues of the city, but are allocated to the control and disposition of the department.

The charter provisions which are pertinent in this connection are as follows:

“SEC. 220. The Department of Water and Power shall have the power and duty:

“(1) To construct, operate, maintain, extend, manage and control works and property for the purpose of supplying the city and its inhabitants with water and electric energy, or either, and to acquire and take, by purchase, lease, condemnation or otherwise, and to hold, in the name of the city, any and all property situated within or without the city, and within or without the state, that may be necessary or convenient for such purpose.

“(2) To regulate and control the use, sale, and distribution of water and electric energy owned or controlled by the

city; the collection of water and electric rates, and the granting of permits for connections with said water or electric works; and to fix the rates to be charged for such connections; and, subject to the approval of the Council by ordinance, to fix the rates to be charged for water or electric energy for use within or without the city, and to prescribe the time and the manner of payment of the same. * * *

* * * * *

“(7) To control and order, except as otherwise in this charter provided, the expenditure of all money received from the sale or use of water, or from any other source in connection with the operation of said water works, and all money received from the sale or use of electric energy, or from any other source in connection with the operation of said electric works; provided, that all such money pertaining to said water works shall be deposited in the City Treasury to the credit of a fund to be known as the “Water Revenue Fund,” and all such money pertaining to said electric works shall be deposited in the City Treasury to the credit of a fund to be known as the “Power Revenue Fund”; and the money so deposited in each such fund shall be kept separate and apart from other money of the city, and shall be drawn only from said fund upon demands authenticated by the signature of the chief accounting employee of the board.

“SEC. 221. None of the money in or belonging to the Water Revenue Fund or the Power Revenue Fund shall be appropriated or used for any purpose except the following purposes pertaining to the municipal works from or on account of which such money was received, to-wit:

“First: For the necessary expenses of operating and maintaining such works.

“Second: For the payment of the principal and interest, or either, due or coming due upon outstanding notes, certificates, or other evidences of indebtedness issued against revenues from such works, in pursuance of Sec. 224, or bonds or other evidences of indebtedness, general or district, heretofore or hereafter issued for the purpose of such works, or parts thereof.

"Third: For the necessary expenses of constructing, extending and improving such works, including the purchase of lands, water rights and other property; also the necessary expenses of conducting and extending the business of the department pertaining to such works; also for reimbursement to another bureau on account of services rendered, or material, supplies, or equipment furnished; also for expenditures for purposes for which bonds, or evidences of indebtedness provided for in Section 224, shall have been authorized, subject to reimbursement as soon as practicable, from monies derived from the sale or issuance of such bonds or evidences of indebtedness.

"Fourth: To return and pay into the General Fund of the City, from time to time, upon resolution of the board, from any surplus money in either such revenue fund, any sums paid by the city from funds raised by taxation for the payment of the principal or interest of any municipal bonds issued by the city for or on account of the municipal works to which such revenue fund pertains, or of liability arising in connection with the construction, operation or maintenance of the municipal works to which said fund pertains.

"Fifth: For defraying the expenses of any pension system applicable to the employees of the department, that shall be established by the city.

"Fifth (a): For establishing and maintaining a reserve fund to insure the payment at maturity of the principal and interest on all bonds now outstanding or hereafter issued for the purpose of the Municipal Works, and such other reserve funds pertaining to such works as the Board may provide for by resolution subject to the approval of the Council by ordinance. The money set aside and placed in such fund or funds so created shall remain in said fund or funds until expended for the purposes thereof and shall not be transferred to the "Reserve Fund" of the city.

"Sixth: To be transferred as provided in Sec. 382 of this charter.

"SEC. 222. The board shall provide for the cost of extensions and betterments of said water works and electric works from the funds derived from the sale of bonds, general or district, so far as such funds shall be made available for the

use of the board for said purposes, and so far as such funds shall not be made available for the use of the board therefor, from revenues received from the works to which such extensions and betterments pertain, and from the proceeds of loans contracted as provided by Sec. 224.

* * * * *

“Sec. 382. At the close of each fiscal year the Controller and Treasurer shall transfer all surplus money remaining in each fund over and above the amount of outstanding demands and liabilities payable out of such fund to the ‘reserve fund’, except such surplus money as is in the several bond funds, interest and sinking funds, trust funds, the fire and police pension fund, the harbor revenue fund, the library fund, the park fund, the permanent improvement fund, the playground and recreation fund, the power revenue fund and the water revenue fund, but the Council may by ordinance direct that any or all said surplus money in either the harbor revenue fund, the power revenue fund or the water revenue fund be transferred to such reserve fund with the consent of the board in charge of such fund, but not otherwise.”

Leaving entirely out of consideration the proceeds from the sale of bonds, which would no doubt require, under section 18 of Article 11 of the State constitution, the approval of two-thirds of the electors, and leaving entirely out of consideration the proceeds of loans contracted as provided by section 224 of the city charter, which are authorized only for emergency purposes, and bearing in mind that the Department of Water and Power is not authorized to levy taxes, it is apparent that its resources are limited to its earnings from the sale or use of water and of electric energy, and that over these revenues it has complete control of expenditure for the construction, operation, and maintenance of all works and property for the purpose of supplying the city and its inhabitants with water and electric energy.

I am advised by the Secretary of the Interior that yearly revenues of this department are more than ample to meet all of its liabilities under the original and amended contracts, and, therefore, to relieve the city of any necessity of financing the obligations which will arise under these contracts;

that these revenues under the Department of Water and Power are not only amply sufficient for this purpose, but its yearly earnings will in his judgment be amply sufficient to provide for the construction of the transmission lines as well.

The only limitation upon the expenditure of such funds by this department is found in section 369 of the charter of the City of Los Angeles, which reads:

"No department, bureau, division, or office of the city government shall make expenditures or incur liabilities in excess of the amount appropriated therefor."

The method of appropriation is, however, provided in section 83 as follows:

"The board of each department * * * the finances of which are not included in the general budget, but which department itself has control of definite revenues or funds, as elsewhere in this charter set forth, shall, prior to the beginning of each fiscal year, adopt an annual departmental budget and make an annual departmental budget appropriation, covering the anticipated revenues and expenditures of said department. Such departmental budget shall conform, as far as practicable, to the forms and times provided in this charter for the general city budget. Each such budget shall contain a sum to be known as the 'unappropriated balance,' which sum shall be available for appropriation by the board later in the ensuing fiscal year to meet contingencies as they may arise. A copy of such budget, when adopted, and of every resolution subsequently adopted making appropriation from said unappropriated balance, shall promptly be filed with the Mayor and Controller, each. No expenditure shall be made or financial obligations incurred by any such department except as authorized by the annual departmental budget appropriation, or appropriations made subsequent to said annual budget."

Question arises under section 369 of the charter as to whether by the execution of the original and amended contracts a present liability was incurred for the payments to be made thereunder in the future. No authorities have been found construing this charter provision, but similar questions have often arisen under section 18 of article 11 of the Constitution of the State of California, and al-

though this constitutional limitation has no application to contracts made by the Department of Water and Power these authorities must be considered in determining the effect of section 369 of the charter upon the validity of the contracts here in question.

Section 18 of article 11 of the Constitution of California, provides:

“No county, city, town, township, board of education or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity, which shall not exceed forty years from the time of contracting the same; * * *. Any indebtedness incurred contrary to any provision of this section shall be void; * * *.”

The obvious purpose of this limitation is to prevent the city from incurring indebtedness in excess of its yearly revenue, and the question has often arisen in the courts of California as to when an indebtedness or liability is incurred, within the meaning of this provision, when a contract is executed requiring payments to be made from time to time in the future.

There is authority for the proposition that when a municipality receives the entire consideration for its promise to make payments or incur expenditures in the future, a liability is immediately incurred under the provisions of the State constitution. See *Chester v. Carmichael*, 187 Cal. 287; *In re City and County of San Francisco*, 195 Cal. 426; *Mahoney v. City and County of San Francisco*, 201 Cal. 248. But a municipality does not incur an “indebtedness” or “liability” invalid under the constitutional provision when it enters into a contract to pay for services as and when rendered from time to time in the future. The obligations here involved to pay rental and power rates can not be

said to be incurred until the rental accrues and the power is received. Such liabilities are held, for the purpose of this constitutional provision, to be incurred when the services have been rendered and the obligation to pay for them arises. See *McBean v. Fresno*, 112 Cal. 159; *Smilie v. Fresno County*, 112 Cal. 311; *Doland v. Clark*, 143 Cal. 176; *In re City and County of San Francisco*, 191 Cal. 172; Compare *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1.

It may, however, be said that if a contract imposes upon the municipality liabilities to arise in the future which in any year will necessarily exceed the income and revenue provided for such year, it will be invalid. The courts have held that the aggregate of all payments which will be required under such a contract is not to be regarded as a liability presently incurred upon the execution of the contract, and thus incurred within the year of its execution; but they have not held that a municipality may, in the face of the constitutional limitation incur future liabilities which will exceed the income and revenue for the year in which payment thereof will be required, and so to hold would appear to be in direct contradiction of the express provision of the Constitution.

The city, acting through its Department of Water and Power, will be under the necessity to construct transmission lines over which the power for which it has agreed to pay may be transmitted, but in so far as the parties to this contract are concerned it is under no express obligation to do so. Under no circumstances will it be necessary for the city to construct transmission lines in advance of the completion of the dam and generating equipment, and, if, therefore, it appears that during this period it will be able to finance such construction out of current revenues of its Department of Water and Power, I am of the opinion that no legal objection can be made to the contract as amended because of the necessity or liability which may arise to defray these construction costs.

Consideration of these authorities leads to the conclusion that the Department of Water and Power has not incurred a present liability upon the execution of these contracts, and therefore the only effect of section 369 is to require the appropriation in each annual budget of sufficient funds

from the water and power revenues to meet the obligations which will arise under and in connection with the performance of these contracts. Inasmuch as the Secretary of the Interior is clearly of the opinion that such funds will be available and ample for all such purposes, I see no reason for doubting the validity of the contract or for questioning its effect in securing payment to the United States of the amounts of money which will become payable under its terms.

With reference to the validity of the obligation assumed by the Southern California Edison Company, Ltd., its execution of the original contract has been formally approved by its board of directors, and I am informed that the supplemental contract has been duly ratified by the board. There can be no question, therefore, as to the binding effect of this contract upon this corporation.

By the supplemental agreement amending the original "Contract for Lease of Power Privilege" all objections which might have been raised to the validity of this contract upon the ground that the city, the Department of Water and Power, and the company were not bound to take or pay for any electrical energy, except as they might wish, have been removed. Mutuality of obligation is not lacking, and the city and its department are firmly bound to take and/or pay for certain percentages of firm energy as stated and defined in the supplemental contract, and the company is similarly bound to take or pay for certain percentages of such energy which are also defined and stated in the supplemental contract.

The "Contract for Lease of Power Privilege" between the United States, the City of Los Angeles, its Department of Water and Power, and the Southern California Edison Company, Limited, is, in my opinion, a valid agreement binding upon the city and its department to the extent to which funds are available under the provisions of the charter to the department, and is in full compliance with section 4 (b) of the Boulder Canyon Project Act, since the revenues which it will provide out of such funds are, in the judgment of the Secretary of the Interior, adequate to meet the requirements of that section.

Objection has been made to the Metropolitan Water District Power contract on the ground that the district has not yet voted bonds to provide funds to build the aqueduct on which this power would be used. It is unnecessary to consider which step must precede the other—provision for the aqueduct or provision for power and water—in view of the sufficiency of the city and company contracts to meet all requirements of the Act. Even if the aqueduct financing were construed as being a prerequisite, the Secretary's reservation of energy for the district is within his authority under the second paragraph of section 5 (c) of the Act.

Giving consideration only to the city and company contract, I am of the opinion that all the requirements of section 4 (b) of the Boulder Dam Project Act which are made conditions precedent to the appropriation of money, the making of contracts and the commencement of work for the construction of a dam and power plant in Boulder Canyon have been fully met and performed by the Secretary of the Interior in securing the contracts referred to in his letter.

Respectfully,

WILLIAM D. MITCHELL.

To the **PRESIDENT.**

**LEASING OF GOVERNMENT PROPERTY UNDER CONTROL OF
THE SECRETARY OF WAR**

The power conferred by Congress upon the Secretary of War to lease Government property under his control carries with it by implication the power to make such stipulations as are usual between landlord and tenant and reasonably necessary for the proper execution of the power to lease the property.

The Secretary of War may stipulate in such lease that certain alterations and improvements, deemed necessary to make the premises suitable for the lessee's use, shall be made by the lessee, the cost thereof to be deducted from the rent reserved, such stipulation being germane to the subject matter of the lease and not unusual in such transactions.

Insurance policies furnished to the War Department in compliance with the provisions of leases made by the Secretary of War should be left in the latter's custody, and he is not required to deposit them in the General Accounting Office.

DEPARTMENT OF JUSTICE,

June 12, 1930.

SIR: By letter dated September 19, 1929, you asked my opinion on two questions: (1) May the Secretary of War make leases of Government real estate under his control, wherein all or part of the consideration consists in some benefit other than money, and (2) is the Secretary of War under a duty to deposit with the General Accounting Office all insurance policies furnished to the War Department in compliance with the provisions of leases made by the Secretary of War?

Memoranda accompanying this letter state that the questions come up in connection with leases of buildings at the Watertown Arsenal to the Hood Rubber Company, one dated November 14, 1925, and the other dated December 23, 1925. The lease of November 14, 1925, discloses that it was substituted for several prior agreements and leases to the Hood Rubber Company, and leases for a period of five years from January 1, 1926, some buildings located at the Watertown Arsenal consisting of a recuperator shop, a mobile carriage shop, and some lands appurtenant thereto. The rent reserved was \$4,400 per month.

Article V of this lease provides:

"No rental shall be paid by the lessee from January first, 1926, until the termination of such period for which the rental fixed herein shall equal the balance of the cost to the lessee of making the space in the west part of the south bay of Building No. 32 available for leasing, as provided for in Article 2 of Supplemental Agreement dated August seventeenth, 1925, * * *."

Article 2 of the Supplemental Agreement, dated August 17, 1925, provided:

"To make the space in the west end of the south bay available for lease, all machines, materials, work in process, tools, gun carriages, and other property of the United States therein must be removed; eight (8) machines must be removed from Building Number 37 and foundations installed therein for eight (8) of the machines to be removed from Building Number 32 to enable necessary manufacturing operations of the arsenal to be carried on. It is, therefore, agreed that the lessee shall bear all costs necessary for mak-

ing the said space available for lease, which costs, hereinafter defined, shall be determined and agreed upon by the two contracting parties, and no rental shall be paid by the lessee from the date of occupancy of the building, namely, October 1, 1925, until the termination of such period for which the rental fixed herein shall equal the cost of making the space available, but upon the termination of said period rental shall be paid as hereinbefore agreed upon.

"To make the space available for lease, the lessee shall remove the wood partition surrounding the space in the west part of the south bay and the passageway connecting it with the toilet; remove from building 37, place in storage in building 35 and thoroughly apply preservatives to eight (8) machines; remove from building 32, place in storage in building 35 or building 421 and thoroughly apply preservatives to seventeen (17) machines, four (4) platens, seven (7) benches, seven (7) clothes lockers, and three (3) gun carriages; move all materials, work in process, tools, and supplies from building 32 to building 37; erect foundations in building 37 for eight (8) machines, move said eight (8) machines from building 32 to building 37, erect them on foundations, make all electrical and other installations and connections necessary for the operation of the eight (8) machines; said eight (8) foundations and electrical and other installations and connections to be constructed in every detail in accordance with plans, specifications, and instructions of the lessor."

The lease also provided that the lessee should not erect any structures on the premises without the permission of the lessor but that it might install certain loading platforms and other minor structures, and also contained a stipulation that upon the termination of the lease the lessee should remove at once, at its expense, all of the platforms and additions to buildings except that such additions or alterations made by the lessee as the lessor desired to have remain, should become the property of the lessor.

The lease of December 23, 1925, leased to the Hood Rubber Company buildings at the Watertown Arsenal consisting of a central tool shop with shafting, motors, and other machinery at a stipulated monthly rental. Article IV of that lease was as follows:

“To make building 38 available for lease, fifty-seven (57) machines and other property of the United States therein must be removed, transported to, stored in building 35, and prepared for storage by the application of preservatives. It is agreed, therefore, that the lessee shall pay, as an advance of rental, all costs necessary for making the said building available for lease and ready for occupancy, which costs hereinafter defined, shall be determined and agreed upon by the two contracting parties, and no rental shall be paid by the lessee from the date of occupancy of the building, until the termination of such period for which the total rental fixed in Article III shall equal the cost of making the space available, but upon the expiration of said period rental shall be paid as hereinbefore agreed upon.”

These stipulations have the appearance of placing upon the United States the expense of making certain alterations and improvements in the property which the lessee seems to have thought necessary to make the property available for its use, and I understand this part of the transaction has been questioned on the ground that its effect is to cause expenditures to be made in the repair and improvement of Government buildings without prior authority from Congress and an appropriation therefor.

The statute under which the Secretary of War entered into the leases is the Act of July 28, 1892, c. 316, 27 Stat. 321, which provides:

“That authority be, and is hereby, given to the Secretary of War, when in his discretion it will be for the public good, to lease, for a period not exceeding five years and revocable at any time, such property of the United States under his control as may not for the time be required for public use and for the leasing of which there is no authority under existing law, and such leases shall be reported annually to Congress: *Provided*, That nothing in this act contained shall be held to apply to mineral or phosphate lands.”

A regulation of the War Department, paragraph 3*d* (1) of AR 30-1420, provides:

“*d. Character of Compensation.*

“(1) *Grant by lease.*—Compensation under grant by lease will consist of money only, unless it be determined by the

Quartermaster General that it is impracticable to lease for money or that it is manifestly to the interest of the Government to receive other consideration."

In support of the suggestion that this covenant for repairs on Government property at the expense of the United States is unauthorized in the absence of appropriations made by Congress, my attention has been directed to the following provisions of the Revised Statutes:

"**SEC. 3617.** The gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided in the next section, shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. But nothing herein shall affect any provision relating to the revenues of the Post Office Department.

"**SEC. 3618.** All proceeds of sales of old material, condemned stores, supplies, or other public property of any kind, except the proceeds of the sale or leasing of marine hospitals, or of the sales of revenue cutters, or of the sales of commissary stores to the officers and enlisted men of the Army, or of materials, stores, or supplies sold to officers and soldiers of the Army or of the sale of condemned Navy clothing, or of sales of materials, stores, or supplies to any exploring or surveying expedition authorized by law, shall be deposited and covered into the Treasury as miscellaneous receipts, on account of 'proceeds of Government property,' and shall not be withdrawn or applied, except in consequence of a subsequent appropriation made by law.

"**SEC. 3733.** No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose."

On the one hand we have the statute that provides that no expenditures shall be made for repairs on public buildings in the absence of specific appropriations, and on the other we have the statute which expressly authorizes the Secretary of War to make leases of property under his control. I find no difficulty in reconciling these two statutes. It is clear that you have no authority to make use of a covenant in a lease of Government property that rent shall be payable in some form of property other than money as a device for acquiring property at public expense which you have not been authorized to acquire and for which no ap-

appropriations have been made. The case of *Pan American Co. v. United States*, 273 U. S. 456, bears on this question. On the other hand, the power to lease property under your control carries with it by implication the power to make such stipulations as are usual between landlord and tenant and reasonably necessary for the proper execution of the power to lease the property. Each case may have to be determined on its own facts, but the general principle to be applied is whether the stipulation in the lease is one germane to the subject matter of the lease, not unusual in such transactions, and reasonably calculated to make effective the power to lease and enable you to make leases advantageous to the Government, which are matters which you may determine in the exercise of a reasonable discretion. To hold that a stipulation requiring the lessee to make some alterations or improvements in the leased property in order to make the premises suitable for his use is beyond your power and that it is necessary in such cases for you to first apply to Congress for an appropriation authorizing improvements and alterations to make the premises fit for the lessee's use, would seriously hamper the effective exercise of the power to lease. In the two leases which you submit for my consideration, the stipulations respecting repairs to property to be made by the lessee, were to render the property fit for its use, the cost to be deducted from rent which might otherwise be payable to the United States. These stipulations were germane to the purpose of the lease. They are stipulations very common in such contracts, and plainly not a device to avoid the statutory requirement that expenditures for repairs or improvements on public property must not be made until appropriations are available. They were well within your implied powers under the statute authorizing you to make leases of property under your control. You might have accomplished the same result by a stipulation giving the lessee permission to make such repairs at its own expense and then instead of stipulating for a deduction of the expense from the reserved rent, stipulated for a lower monthly rental during the entire term than that now provided for.

Your second question, as to the deposit of insurance policies in the General Accounting Office, depends upon the meaning of section 3743 of the Revised Statutes, as amended by the Act of July 31, 1894, c. 174, sec. 18, 28 Stat. 210, which provides:

"All contracts to be made, by virtue of any law, and requiring the advance of money, or in any manner connected with the settlement of public accounts, shall be deposited promptly in the offices of the Auditors of the Treasury, according to the nature of the contracts: *Provided*, That this section shall not apply to the existing laws in regard to the contingent funds of Congress."

By the Act of June 10, 1921, c. 18, sections 304, 310, 42 Stat. 24, 25, the duties of the Auditors of the Treasury were transferred to the General Accounting Office. (See U. S. Code, Title 41, section 20.)

These insurance policies are certainly not contracts "made, by virtue of any law, and requiring the advance of money." The sole question is whether they are "in any manner connected with the settlement of public accounts."

I am advised that it is frequently necessary to make changes in these policies by amendment or endorsement or by the issuance of new policies in surrender of the old policies. It is also your duty to keep informed of the expiration dates and to make sure that the policies are kept in force. It also appears that in case of a fire the loss would have to be adjusted by you. While there may be some room for differences of opinion as to just what is meant by contracts "in any matter connected with the settlement of public accounts," since the responsibility for attending to the amendments, substitutions and expirations and adjustments under this insurance rests with you, and because of the practical inconvenience if the policies are not in your custody, I am disposed to resolve the doubt as to the meaning of the statute by holding that the policies should be left in your custody, and I advise that you are not required to deposit them in the General Accounting Office.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF WAR.

GOVERNMENT BILLS OF LADING—ATTORNEY GENERAL'S
OPINION

There is nothing contained in General Regulations No. 69 of the Comptroller General which can prohibit the exercise of the authority of the Secretary of War to negotiate lawful contracts for the furnishing of "means of transportation of all classes and kinds required by the Army."

The promulgation of Regulation 69 in so far as it interferes with the exercise of the statutory authority granted to the Secretary of War is not an exercise of the power to make regulations for accounting purposes granted to the Comptroller General, but is in effect an attempt to limit the authority of the Secretary of War, expressly granted by Act of Congress, and therefore, to this extent at least, is invalid.

The Attorney General declines to render an official opinion as to whether the Secretary of War may lawfully make shipments of Government property under the standard form of the Government bill of lading with clause 7, as prescribed by Regulation 69 of the Comptroller General, eliminated therefrom, and thus impose upon the Government's right to sue the carrier the limitations which are contained in the commercial bills of lading approved by the Interstate Commerce Commission, for the reason that upon this question there is conflict of judicial decision, the Department having repeatedly refused to render opinions which might bring it into conflict with a judicial tribunal.

DEPARTMENT OF JUSTICE,

June 13, 1930.

SIR: I have the honor to acknowledge the receipt of your letter of the 12th ultimo, wherein you state that:

"An unprecedented situation has arisen which tends seriously to affect and impede execution of duties of the War Department with respect to transportation of the Army and its supplies, due to the recent action of common carriers in declining to accept shipments of freight to be transported under the standard Government form of bill of lading. This action by the carriers resulted from adoption of a new form of Government bill of lading, the use of which was prescribed by the Comptroller General of the United States in General Regulations No. 69, dated August 24, 1928. The reason stated by carriers for their refusal to accept the new form is that a new clause, condition 7, reading as follows: 'In case of loss, damage, or shrinkage in transit, the rules and conditions governing commercial shipments shall not

apply as to period within which notice thereof shall be given the carriers or to period within which claim therefor shall be made or suit instituted' was added therein."

My opinion is requested as to whether the Secretary of War has authority to cancel or authorize cancellation of clause 7 in Government bills of lading issued in his Department.

Your inquiry involves two questions: (1) Whether in contracts for the shipment, transportation, and delivery of Government property you are required by General Regulations No. 69 of the Comptroller General to include clause 7 of the Standard Form Government Bill of Lading. (2) If not required by the regulation of the Comptroller General to include this clause, whether you may lawfully make shipments of Government property under Standard Forms of the Government Bill of Lading with clause 7 eliminated.

In addition to clause 7, the Standard Form of Government bill of lading contains the following pertinent clauses:

"2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

"3. Shipment made upon this bill of lading shall take no higher rate than would be charged had the shipment been made upon the uniform straight bill of lading or uniform express receipt."

The powers and duties of the Comptroller General are defined by Title III of the "Budget and Accounting Act, 1921" (42 Stat. 20, 23; U. S. C. Title 31, secs. 41, 44, 71, 46, 49, 52, 54). Among other provisions not material to this opinion the Act contains the following:

"SEC. 301. There is created an establishment of the Government to be known as the General Accounting Office, which shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States * * *.

* * * * *

"SEC. 304. All powers and duties now conferred or imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department, and the duties of

the Division of Bookkeeping and Warrants of the Office of the Secretary of the Treasury relating to keeping the personal ledger accounts of disbursing and collecting officers, shall, so far as not inconsistent with this Act, be vested in and imposed upon the General Accounting Office and be exercised without direction from any other officer. * * *

"SEC. 305. Section 236 of the Revised Statutes is amended to read as follows:

"SEC. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

* * * * *

"SEC. 306. All laws relating generally to the administration of the departments and establishments shall, so far as applicable, govern the General Accounting Office."

* * * * *

"SEC. 309. The Comptroller General shall prescribe the forms, systems, and procedure for administrative appropriation and fund accounting in the several departments and establishments, and for the administrative examination of fiscal officers' accounts and claims against the United States."

* * * * *

"SEC. 311. (f) The Comptroller General shall make such rules and regulations as may be necessary for carrying on the work of the General Accounting Office. * * *

"SEC. 312. (c) The Comptroller General shall specially report to Congress every expenditure or contract made by any department or establishment in any year in violation of law."

"(d) He shall submit to Congress reports upon the adequacy and effectiveness of the administrative examination of accounts and claims in the respective departments and establishments and upon the adequacy and effectiveness of departmental inspection of the offices and accounts of fiscal officers."

"SEC. 313. All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial trans-

actions, and methods of business of their respective offices as he may from time to time require of them."

Before the enactment of the Budget and Accounting Act, the Comptroller of the Treasury had the power to "prescribe the forms of keeping and rendering all public accounts," except those relating to the Postal revenues, Act of July 31, 1894, c. 174, sec. 5, 28 Stat. 206, but I am unable to find any statute prior thereto authorizing the Comptroller of the Treasury to prescribe the terms or conditions of a bill of lading contract which the various departments and establishments of the Government should make, nor does the said Budget and Accounting Act confer such authority upon the Comptroller General.

Under sections 309 and 311 (f), *supra*, the Comptroller is authorized to prescribe by General Regulations the forms to be used in "Administrative appropriation and fund accounting in the several Departments and establishments," but no authority is granted by these provisions to limit by Regulation or by the adoption of Standard Forms the authority vested in other officers of the Government to make lawful contracts in its behalf. This conclusion appears to be quite obvious on the face of the statute. It is as clearly supported by the legislative history. Section 309 was not in the original Budget and Accounting bill, H. R. 9783, 66th Cong., 2d Sess., as passed by the House. This Section originated in the Senate. The Report of the Committee recommending the inclusion of section 309 contains the following:

"It has been repeatedly pointed out that the principal defects of the Government accounting system result from the absence of unified control and from the diffusion of accounting authority and responsibility among numerous officials each of whom has effectually exclusive jurisdiction in his own field. Any satisfactory system of Government accounting should have as its underlying principle the investment of final and exclusive authority and responsibility over all accounting and auditing operations in a single official; and this principle should be applied to the furthest extent consistent with the exercise of an undivided control over strictly administrative matters by the heads of departments and establishments.

"The Government has become notorious for lack of uniformity in its accounting methods. * * *

"If new provisions are to be made for the accounting establishment of the United States at this or any other time, they should accomplish a concentration of authority over all Federal accounting activities. They should confer upon a single official the power to prescribe and to supervise departmental methods of bookkeeping, and of examining claims and accounts of fiscal officers * * *.

"It is the feeling of the Committee that the House Bill is deficient in that it accomplishes none of these things. The committee has, therefore, inserted in the bill additional provisions which it believes necessary to bring about a proper reorganization of the accounting system of the Government * * *.

"The committee bill * * * confers upon the General Accounting office the authority and power to prescribe and to supervise methods of accounting in the departments; to prescribe and supervise the methods employed in the administrative examination of accounts and claims; and to exercise in general a control over all the accounting procedures of the Government * * *.

"In the committee bill the comptroller general of the United States is given exclusive jurisdiction over all matters relating to auditing and accounting forms, systems, and procedure * * * Senate Rept. No. 524, 66th Cong., 2d Sess."

The question whether in the exercise of his powers as an accounting officer the Comptroller General may require by General Regulation inclusion of clause 7 in the Standard Form of Government Bill of Lading depends upon whether the clause relates merely to the form in which agreement is expressed, or affects the substance of the agreement itself. It would perhaps suffice to say that the refusal of the carriers to receive shipments under the Standard Form, which, being different from the commercial form approved by the Interstate Commerce Commission, can not be imposed upon them against their will, at least in the absence of statutory authority, concludes the point that the inclusion of clause 7 is dependent upon negotiation and agreement; but it is only

necessary to read clause 3 in connection with clause 7 to see how vitally the bargain is controlled and prescribed by the adoption of the Standard Form. Clause 3 provides that the rates shall not exceed the rates charged on commercial shipments, while clause 7 requires a change of substance in the contract upon which such shipments are carried. This is asking something for nothing, and the carriers are not required to assent to such conditions merely because, in the exercise of his powers as an accounting officer, the Comptroller General has prescribed a form which contains them.

A bill of lading is primarily a contract between the carrier and the shipper (*St. Louis, Iron Mtn. So'n. Ry. v. Starbird*, 243 U. S. 592, 597) and unless the Government is content to accept the agreement in substance prescribed for commercial shipments by the Interstate Commerce Commission, pursuant to sec. 20 of the Interstate Commerce Act, the terms of shipment are necessarily a matter of negotiation between the parties. Of course, the bill of lading is an instrument which in addition to evidencing the contract of carriage must serve a secondary purpose in connection with Government accounting, and for such purposes no doubt the Comptroller General may prescribe its form, provided he does not undertake to impose contractual obligations upon the parties which they are legally entitled to negotiate. In its use for the purpose of "administrative appropriation and fund accounting in the several departments and establishments" of the Government, the form of bill of lading, after its contractual terms and conditions have been agreed upon, is, by virtue of sec. 309 of the Budget and Accounting Act, subject to the approval of the Comptroller General as a form for accounting purposes; but such approval can not in any way extend to the contractual obligations, which the parties are entitled freely to negotiate without dictation from the Comptroller General, whose function is that of an accounting officer.

Congress has not authorized the Comptroller General to negotiate or prescribe in advance the terms of such contracts, but on the contrary has by legislation specially charged the Secretary of War with that duty in so far as the War Department is concerned. The authority of the Secretary of

War in this regard is defined by the following statutory provisions.

Section 220, Revised Statutes (U. S. C., Title 10, sec. 1363), provides:

“The transportation of troops, munitions of war, equipment, military property, and stores, throughout the United States, shall be under the immediate control and supervision of the Secretary of War and such agents as he may appoint.”

The Act of June 4, 1920, c. 227, subchap. 1, sec. 9 (41 Stat. 766; U. S. C., Title 10, sec. 72), provides that the Quartermaster General, under the authority of the Secretary of War, shall be charged with “the transportation of the army by land and water, including the transportation of troops and supplies by mechanical or animal means; with the furnishing of means of transportation of all classes and kinds required by the Army; and with such other duties not otherwise assigned by law as the Secretary of War may prescribe: * * *.”

The Act of July 5, 1884, c. 217 (23 Stat. 111; U. S. C., Title 10, sec. 73) provides:

“The Quartermaster General and his officers, under his instructions, wherever stationed, shall receive, transport, and be responsible for all property turned over to them, or any one of them, by the officers or agents of any Government survey, for the National Museum, or for the civil or naval departments of the Government, in Washington or elsewhere, under the regulations governing the transportation of Army supplies, the amount paid for such transportation to be refunded or paid by the bureau to which such property or stores pertain.”

Paragraph 2a, AR 30-905, provides:

“The Quartermaster General is responsible for the supervision and direction of all matters connected with the transportation of the personnel and property of the Army by land and water, and is also designated as War Department traffic manager, and will exercise jurisdiction over all transportation activities of the War Department.”

The promulgation of Regulation 69 in so far as it interferes with the exercise of the statutory authority thus granted to the Secretary of War is not an exercise of the

power to make regulations for accounting purposes granted to the Comptroller General, but is in effect an attempt to limit the authority of the Secretary of War, expressly granted by Act of Congress, and therefore, to this extent at least, is invalid. (*United States v. United Verde Copper Co.*, 196 U. S. 207, 215; *Williamson v. United States*, 207 U. S. 425, 462; *United States v. George*, 228 U. S. 14, 20; *Intern'l Ry. Co. v. Davidson*, 257 U. S. 506, 514.)

I am, therefore, of the opinion that there is nothing contained in this Regulation which can prohibit the exercise of the authority of the Secretary of War to negotiate lawful contracts for the furnishing of "means of transportation of all classes and kinds required by the Army."

The question remains, however, as to whether, in the exercise of this authority, the Secretary of War may cancel clause 7 of the Government bill of lading, as prescribed by Regulation 69 of the Comptroller General, and make shipments under the form prescribed in the Regulation with this clause eliminated. The legal effect of the elimination is to bring into operation clause 2, and thereby to import into the contract of carriage the limitations contained in commercial bills of lading approved by the Interstate Commerce Commission under sec. 20 of the Interstate Commerce Act, which limit the time in which suits may be brought against the carrier and impose as a condition of suit the presentation of claim within a limited period of time. The question whether such limitations may be imposed upon the Government's right to sue is one which has been the subject of judicial consideration and determination. The question was presented and decided by the Circuit Court of Appeals for the Fourth Circuit in *United States v. Seaboard Air Line Ry. Co.*, 22 F. (2d) 113, where it was held that a bill of lading which imposed the limitations contained in the commercial bills of lading approved by the Interstate Commerce Commission was binding upon the Government. In *M. K. & T. R. R. Co. v. United States*, 62 C. Cls. 373, and in *American Ry. Express Co. v. United States*, 62 C. Cls. 615, the Court of Claims has expressed opinions to the contrary.

The question having thus been considered in the courts, and a conflict of judicial decision thereon having arisen,

I am constrained to withhold my official opinion as to whether you may lawfully make shipments of government property under Standard Forms of the Government Bill of Lading with clause 7 eliminated, and thus impose upon the Government's right to sue the carrier the limitations which are contained in the commercial bills of lading approved by the Interstate Commerce Commission. My predecessors have repeatedly refused to render opinions which might bring this Department into conflict with a judicial tribunal, and I do not feel justified in departing from this practice, instances of which will be found in 20 Op. 618; 20 Op. 729; 23 Op. 221; 24 Op. 59; 32 Op. 472; 33 Op. 86; 35 Op. 297. For your information I may add that this Department declined to apply to the Supreme Court for a writ of certiorari to review the decision in the *Seaboard Air Line Case*, and has regarded the reasoning of the opinion in that case as sufficient warrant for its action in so doing.

Respectfully submitted.

WILLIAM D. MITCHELL.

To the SECRETARY OF WAR.

COURSES IN MILITARY TACTICS IN LAND-GRANT AGRICULTURAL COLLEGES

The Secretary of the Interior is justified in considering that an agricultural college which offers a proper, substantial course in military tactics complies sufficiently with the requirements as to military tactics in the Act of July 2, 1862 (12 Stat. 503), and the amendatory Acts, even though the students at that institution are not compelled to take that course.

DEPARTMENT OF JUSTICE,

June 20, 1930.

SIR: I have the honor to acknowledge receipt of your letter of May 23, 1930, requesting my opinion as to whether agricultural colleges having grants under the Act of July 2, 1862, c. 130, 12 Stat. 503, and amendatory Acts, are required to include military tactics among the compulsory courses of study or whether they may simply offer this subject as an elective course.

The pertinent provision of the statute is contained in section 4, which reads as follows:

"And be it further enacted, That all moneys derived from the sale of the lands aforesaid by the States to which the lands are apportioned, and from the sales of land scrip hereinbefore provided for, shall be invested in stocks of the United States, or of the States, or some other safe stocks, yielding not less than five per centum upon the par value of said stocks; and that the moneys so invested shall constitute a perpetual fund, the capital of which shall remain forever undiminished (except so far as may be provided in section fifth of this act), and the interest of which shall be inviolably appropriated, by each State which may take and claim the benefit of this act, to the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life." (Italics supplied.)

Amendments of this section by the Act of March 3, 1883, c. 102, 22 Stat. 484 (U. S. C., Title 7, sec. 304) and by the Act of April 13, 1926, c. 130, 44 Stat. 247 (U. S. C. Supp. III, Title 7, sec. 304), reenacted the language printed in italics above, without change.

By the Act of August 30, 1890, c. 841, 26 Stat. 417, annual appropriation is made "for the more complete endowment and maintenance of colleges for the benefit of agriculture and the mechanic arts now established, or which may be hereafter established, in accordance with an act of Congress approved July second, eighteen hundred and sixty-two. * * *." By section 4 of this Act the Secretary of the Interior is charged with its administration, and he is directed to ascertain and certify to the Secretary of the Treasury annually as to each State and Territory whether it is entitled to receive its share of the annual appropriation. There is no requirement that the moneys appropriated under this Act shall be devoted by the State to an institution then teaching military tactics, but only to an institution which had been or should be established under the Act of July 2, 1862. The Act of August 30, 1890, pro-

vides that the money shall "be applied only to instruction in agriculture, the mechanic arts, the English language and the various branches of mathematical, physical, natural, and economic science, with special reference to their applications in the industries of life, and to the facilities for such instruction: * * *."

But by the Act of March 4, 1907, c. 2907, 34 Stat. 1256, 1281, which appropriated additional money "for the more complete endowment and maintenance of agricultural colleges now established, or which may hereafter be established, in accordance with the Act of Congress approved July second, eighteen hundred and sixty-two, and the Act of Congress approved August thirtieth, eighteen hundred and ninety, * * *" it is provided that the money so appropriated is "to be applied only for the purposes of the agricultural colleges as defined and limited in the Act of Congress approved July second, eighteen hundred and sixty-two, and the Act of Congress approved August thirtieth, eighteen hundred and ninety." Another paragraph of this statute provides that the payment of the money appropriated shall be governed by the provisions of the Act of 1890.

Under these statutes you and your predecessors have recognized the duty, so far as the appropriations made by the Act of March 4, 1907, are concerned, to withhold a certificate as to any State which has not one or more colleges which are conducted in compliance with the provisions of the Act of July 2, 1862. In determining whether such a certificate should be issued, you are consequently confronted with the problem whether an institution, in order that it may comply with the Act of July 2, 1862, must include military tactics as a compulsory course of study.

The statutes nowhere specifically require that the offered course in military tactics must be compulsory. My attention has been called to the fact that at the time when the original statute was passed in 1862, it appears that all or almost all courses offered in universities were compulsory, but, of course, this is not conclusive of the intention of Congress. The association of the words "military tactics" in the statute with the words "such branches of learning as are related to agriculture and the mechanic arts" shows that there was no intention to require instruction in military

tactics to be compulsory upon the students any more than those branches of learning related to agriculture and mechanic arts. If one branch is compulsory, all must be, and when we consider the great variety of branches which are related to agriculture and mechanic arts under the modern educational system, it is apparent that it would be impracticable to require any student to take all of such courses. It is generally recognized that there is no obligation on agricultural colleges having land grants under the Act of July 2, 1862, to compel their students to take any course related to agriculture or mechanic arts.

The use of the words "leading object" in the statute indicates that Congress must have intended to repose some discretion in the State or in the college to determine to what extent agriculture and mechanic arts, scientific and classical studies, and military tactics should be taught or required. The additional provision of the statute that these branches of learning should be taught "in such manner as the legislatures of the States may respectively prescribe," also suggests that it was the purpose of Congress to leave to the States a wide measure of control in the administration of the statute.

I have given consideration to the legislative history of the Act of 1862. The manner in which the language in question came to be inserted in the bill does not convince me that Congress intended the course in military tactics to be compulsory. If it had had such an intention, it seems fair to assume that it would have expressed that intention in clear language. An examination of the report of the speech of Mr. Morrill of Vermont (Cong. Globe, 37th Cong., 2d Sess., Part 4, Appendix, p. 256), who had charge of this bill in the House, reveals no clear statement to the effect that it was contemplated that military training would be compulsory on all students.

I have also considered what was done after the passage of the Act of 1862. From a memorandum submitted to me it appears that in several of the States, at least, courses in military tactics were compulsory in the years immediately following the passage of the Act. But in a letter to the Secretary of War, under date of July 19, 1923, the Acting

Secretary of the Interior informed the Secretary of War that—

“the policy of the Department of the Interior has been that a State fulfills its obligation under the law when it offers instruction and provides facilities for instruction in the branches of learning specified in the land-grant college legislation.”

This ruling was published in 1925 by the Bureau of Education of your Department in a bulletin entitled “Federal Laws and Rulings Affecting Land-Grant Colleges.” I understand that this policy has been consistently followed, and that cases presenting the precise question under consideration have arisen. The problem has in particular been presented with respect to the State of Wisconsin since 1923, for in that year the legislature of that State provided by statute that the study of military training at the State University should be optional. (Wis. Laws, 1923, c. 226.) It is significant that in 1926 Congress, in amending the Act of July 2, 1862, reenacted the precise language of the Act of July 2, 1862, italicized at the outset of this opinion. The Supreme Court has held in *National Lead Co. v. United States*, 252 U. S. 140, 146–147, that the reenactment of a statute while an administrative interpretation of the statute is in effect—“amounts to an implied legislative recognition and approval of the executive construction of the statute * * *; for Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the Government. *United States v. Bailey*, 9 Pet. 238, 256.”

To the same effect are *United States v. Cerecedo Hermanos y Compania*, 209 U. S. 337, 339; *United States v. Falk & Brother*, 204 U. S. 143, 149.

I am of the opinion that the construction of the statute adopted by your Department is a reasonable one, and that it was in effect approved by Congress by the reenactment of the language in question after the adoption and publication of that construction by your Department. Added force is given to the reenactment of this language by the fact that it occurred after the legislation in Wisconsin referred to above.

I, therefore, advise you that you are justified in considering that an agricultural college which offers a proper, substantial course in military tactics complies sufficiently with the requirements as to military tactics in the Act of July 2, 1862, and the other Acts above mentioned, even though the students at that institution are not compelled to take that course.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE INTERIOR.

VESSELS ENTITLED TO ENGAGE IN COASTWISE TRADE

The following classes of vessels may continue to engage in the coastwise trade and merchandise transported on them is not subject to forfeiture:

1. Vessels exempted from the requirements of documentation by section 4385 of the Revised Statutes and the Act of April 18, 1874 (18 Stat. 31) ;
2. Foreign-built vessels wrecked on the coasts of the United States, when purchased by citizens of the United States and repaired in American shipyards pursuant to the provisions of section 4136 of the Revised Statutes, as reenacted and revised by the Act of February 24, 1915 (38 Stat. 812) ;
3. Foreign-built vessels forfeited for breach of the laws of the United States and owned by citizens of the United States and which have been documented pursuant to section 4132 of the Revised Statutes, as amended by the Act of August 24, 1912 (37 Stat. 562).

DEPARTMENT OF JUSTICE,

June 30, 1930.

SIR: I have the honor to refer to the letter of January 7, 1930, of the Acting Secretary of Commerce asking my opinion whether the following classes of vessels may engage in the coastwise trade:

1. Vessels exempted from the requirements of documentation by Section 4385 of the Revised Statutes, and the Act of April 18, 1874, c. 110, 18 Stat. 31 (U. S. C., Title 46, secs. 335, 336) ;
2. Foreign-built vessels wrecked on the coasts of the United States, when purchased by citizens of the United States and repaired in American shipyards pursuant to

Section 4136 of the Revised Statutes, as reenacted and revised by the Act of February 24, 1915, c. 57, 38 Stat. 812 (U. S. C., Title 46, sec. 14) ;

3. Foreign-built vessels forfeited for breach of the laws of the United States and sold to citizens of the United States, which have been documented pursuant to section 4132 of the Revised Statutes, as amended by the Act of August 24, 1912, c. 390, par. 5, 37 Stat. 562 (U. S. C., Title 46, sec. 11).

You specifically request my opinion whether section 27 of the Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988, 999 (U. S. C., Title 46, sec. 883, repeals any or all of the above statutes, under which, so your Department advises me, all three classes of vessels have been permitted and now are permitted to engage in the coastwise trade.

Section 27 of the Merchant Marine Act of 1920 provides:

"That no merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel then a vessel built in and documented under the laws of the United States¹ and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by sections 18 or 22 of this Act": [with provisos not bearing on the questions under consideration].

A strict, literal construction of section 27 would seem to prevent, under penalty of forfeiture, any merchandise from being carried in the coastwise trade in any vessel not "built in and documented under the laws of the United States" except the foreign-built vessels described in sections 18 and

¹ Under section 37 of the Merchant Marine Act of 1920 (U. S. C., Title 46, sec. 888) the term "vessel" is defined as including "all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or capable of being or are intended to be used as a means of transportation on water." The phrase "documented under the laws of the United States" is defined to mean "registered, enrolled, or licensed under the laws of the United States."

Vessels in the foreign trade are *registered*. Those in the domestic or coastwise trade and fisheries are *licensed*, or if of twenty tons and upwards they are *enrolled* and *licensed*. See *Maul v. United States*, 274 U. S. 501, 503; *Anderson v. Pacific Coast S. S. Co.*, 225 U. S. 187, 199; *Badger v. Gutierrez*, 111 U. S. 734, 735-737; *The Mohawk*, 3 Wall. 566, 570-571.

22, which do not include any of the vessels as to which my opinion is requested.² Nevertheless, neither section 27 nor any other provision of the Act of 1920 expressly repeals any of the statutes in question, although other sections of the Act do repeal and amend numerous other specified statutes relating to domestic and foreign commerce, including certain provisions of the Revised Statutes. The Act contains no provisions specifically relating to the classes of vessels here involved and does not change the then existing laws as to the coastwise trade, unless section 27 has this effect. Because of these considerations and the doctrine that repeals by implication are not favored, it seems clear that section 27 must be construed in connection with the prior statutes relating to registry, enrollment, and license, and, moreover, in light of its legislative history.

Title L of the Revised Statutes, sections 4311-4390, entitled "Regulation of Vessels in Domestic Commerce," prescribes what vessels are permitted to engage in the coastwise trade. Section 4311 (Act of February 18, 1793, c. 8, 1 Stat. 305; U. S. C., Title 46, sec. 251) provides that—

"vessels of twenty tons and upward, enrolled in pursuance of this Title, and having a license in force, or vessels of less than twenty tons, which, although not enrolled, have a license in force, as required by this Title, *and no others*, shall be deemed vessels of the United States entitled to the privileges of vessels employed in the coasting-trade or fisheries." (Italics supplied.)

Section 4312 of the Revised Statutes (Act of February 18, 1793, *supra*; U. S. C., Title 46, sec. 252) provides that in order to be enrolled a vessel

"shall possess the same qualifications, and the same requirements in all respects shall be complied with, as are required before registering a vessel; * * *."

² Sections 18 and 22 of the Merchants Marine Act of 1920, respectively, extend the privilege of the coastwise trade to (a) foreign-built vessels owned by any corporation in which the United States is a stockholder, or which have been sold, leased, or chartered by the Shipping Board to a citizen of the United States while owned, leased or chartered by such person; and (b) all foreign-built vessels admitted to American registry and owned by United States citizens on February 1, 1920, and all foreign-built vessels owned by the United States at the time of the enactment of the Act when sold to and owned by citizens of the United States.

Section 4132 (Act of December 31, 1792, c. 1, 1 Stat. 287, 288) provides that—

“Vessels built within the United States, and belonging wholly to citizens thereof, and vessels which may be captured in war by citizens of the United States, and lawfully condemned as prize, or which may be adjudged to be forfeited for a breach of the laws of the United States, being wholly owned by citizens, and no others, may be registered as directed in this Title.”

With this brief background I shall consider separately the three classes of vessels about which you inquire.

1. *Vessels exempted from the requirements of documentation.*

Section 4385 of the Revised Statutes, Title L (Act of February 18, 1793, *supra*; U. S. C., Title 46, sec. 335), provides that nothing in Title L “shall be construed to extend to any boat or lighter not being masted, or if masted and not decked, employed in the harbor of any town or city.” An Act of April 18, 1874, c. 110, 18 Stat. 31 (U. S. C., Title 46, sec. 336, which does not appear in the Revised Statutes, provides that the Act of February 18, 1793, *supra* (entitled “An Act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same”), shall not apply to canal boats or boats employed on the internal waters or canals of any State, except such boats as are “provided with sails or propelling machinery of their own adapted to lake or coastwise navigation,” and “except such as are employed in trade with the Canadas.”

Under these statutes the classes of vessels described therein have been permitted for many years to engage in the coastwise trade without being required to be documented. The use of such vessels in the coastwise trade, in so far as they were owned by American citizens, was wholly unaffected by the provision of section 4347, Title L, of the Revised Statutes that—

“No merchandise shall be transported under penalty of forfeiture thereof, from one port of the United States to another port of the United States, in a vessel belonging wholly or in part to a subject of any foreign power.”

Section 1 of an Act of February 17, 1898, c. 26, 30 Stat. 248, amended the above provision of section 4347³ to read as follows:

“That no merchandise shall be transported by water under penalty of forfeiture thereof from one port of the United States to another port of the United States, either directly or via a foreign port, or for any part of the voyage, in any other vessel than a vessel of the United States.”

The phrase “vessel of the United States” is explained by other sections of the Revised Statutes. Under section 4131 (U. S. C., Title 46, sec. 221) “vessels registered pursuant to law, and no others, except such as shall be duly qualified, according to law, for carrying on the coasting trade and fisheries, or one of them, shall be deemed vessels of the United States.” Section 4311 (U. S. C., Title 46, sec. 251) declares that only vessels licensed, or enrolled and licensed, under Title L “shall be deemed vessels of the United States entitled to the privileges of vessels employed in the coasting trade or fisheries.” These statutory definitions limit the term “vessel of the United States” to vessels documented under the laws of the United States. *White's Bank v. Smith*, 7 Wall. 646, 655-656; *Badger v. Gutierrez*, 111 U. S. 734, 736; *The Alta*, 136 Fed. 513, 519 (C. C. A. 9th); 18 Op. 234; Customs Regulations (1923 Ed.), Art. 10.

Accordingly, a literal construction of the Act of February 17, 1898, would seem to prevent, under penalty of forfeiture, any merchandise being carried in the coastwise trade in any of the classes of vessels described in section 4385 of the Revised Statutes and the Act of April 18, 1874, *supra*. So construed, the effect of the Act of 1898 would have been to exclude from the domestic trade, because undocumented, thousands of vessels, built in the United States and owned by citizens of the United States, which are essential to the orderly movement of our domestic commerce and many of which are useful for no other purpose. This is a result of such far-reaching consequences that the Act should not be

³ Although the Act of February 17, 1898, *supra*, does not mention section 4347 of the Revised Statutes, it was expressly designed as an amendment to that section. See the letter of February 9, 1898, from the Secretary of the Treasury, in whose Department the bill was prepared, to the Senate Committee on Commerce, explaining the bill. (Cong. Rec., Vol. 31, p. 1729.)

construed to achieve it unless it is clear that such a purpose was intended.

The Act of 1898 makes no reference whatever to the classes of vessels now under consideration. The clearly defined purpose of section 1 of that Act, as shown by the Senate and House Committee Reports, was to guard against "evasions" under the then existing laws, and to insure that the inhibition of section 4347 of the Revised Statutes extended to the *entire* voyage between American ports. The "essential amendment" was the addition to section 4347 of the words, "or for any part of the voyage." It was expressly declared that otherwise the coastwise laws were left unchanged.⁴

Moreover, the fact that the Act of February 17, 1898, is an amendment to section 4347 indicates that that Act, like section 4347, must be read as subject to the statutes above set forth expressly excepting certain vessels from the requirements of documentation.

The Act of 1898 was not regarded by the Treasury Department or by the Bureau of Navigation as changing the law with respect to the vessels in question. No attempt was made to prevent such vessels from engaging in the coastwise trade or to subject the merchandise carried upon them to forfeiture. See Customs Regulations (1915 Ed.), Art. 14. I have no hesitation in adopting as correct the construction

⁴ In the letter of the Secretary of the Treasury of February 9, 1898, to the Senate Committee on Commerce, the Secretary, referring to Section 1 of the Act—the only section here material—stated (Cong. Rec., Vol. 31, p. 1729) :

"The essential amendment is in the words 'or for any part of the voyage.' The question has recently been put to the Treasury whether American goods consigned to Alaskan ports from Seattle can be carried in American vessels to Victoria, a distance of only 72 miles, and at Victoria be put on British vessels to be carried to Dyce, a distance of about 900 miles, or to St. Michael, a distance of about 2,000 miles. The Treasury Department has ruled that this is a violation of the laws reserving the coasting trade to American vessels. It is a palpable evasion of those laws, but in some quarters doubt is expressed whether the courts will not decide, * * * that the law had been successfully evaded, not violated. * * * The policy of the United States is to confine carrying by water for the whole voyage between American ports to American vessels. It is believed that section 1 explicitly affirms that policy and removes all doubt."

Senator Frye, of the Committee on Commerce, and Mr. Payne, of the House Committee on the Merchant Marine and Fisheries, in presenting the bill to the Senate and House, repeatedly declared that the only change contemplated by that part of the Act in question was that above set forth in the Secretary's letter, and that otherwise the existing coastwise laws were left unchanged. (Cong. Rec., Vol. 31, pp. 1610, 1729, 1730.)

placed upon the Act of 1898 by the administrative departments in charge of its enforcement.

Although it does not so state, section 27 of the Act of 1920 is a reenactment, with some changes, of section 4347 of the Revised Statutes, as amended by the Act of 1898. Under the 1898 Act the coastwise trade was confined to "vessels of the United States," and under section 27 of the 1920 Act that trade was confined (with the exceptions stated) to vessels "built in and documented under the laws of the United States and owned by persons who are citizens of the United States." The vessels now under consideration do not come within the literal provisions of the 1920 Act any more than they did within the provisions of the 1898 Act. Nevertheless, for reasons similar to those above set forth, I regard section 27, like the Act of 1898, as compatible with and subject to section 4385 of the Revised Statutes and the Act of April 18, 1874.

An examination of the Act of 1920 and its legislative history reveals no intention to change the law with respect to vessels which were exempted from the requirements of documentation. No provision of the Act deals specifically with the laws concerning documentation, save with respect to foreign-built vessels admitted to American registry during the war, or acquired by the United States during the war and disposed of or to be disposed of to American citizens.

Section 27 formed no part of the Act as originally drafted and passed by the House. As explained by Senator Jones, of the Committee on Commerce, it was, like section 1 of the Act of February 17, 1898, an amendment offered by the Senate for the purpose of guarding against "evasions" possible under the existing law. In explanation, Senator Jones referred to an opinion of the Attorney General (30 Op. 3), which held the Act of 1898 applicable only to a voyage entirely by water. The Senate amendment extended the penalty of the statute to transportation "by water, *or by land and water*," following a suggestion contained in the Attorney General's opinion. (Cong. Rec., Vol. 59, pp. 7348-7350, 6811.) The Senator expressly disclaimed any purpose of changing the coastwise laws. In explaining the amendment, he said (Cong. Rec., Vol. 59, pp. 6862-6863):

"* * * there is nothing in this bill that deals with the coastwise laws or coastwise shipping except the provision extending the application of the coastwise laws to the Philippine Islands, or to the island possessions of the United States, and the provision to prevent the evasion of the coastwise laws to which I referred yesterday, having in view especially the situation between Seattle and Skagway, Alaska. *We do not deal in general in this bill with the coastwise laws. They are left just as they are; we have not attempted to interfere with them.*" (Italics supplied.)

Your Department advises me that during the ten years since the enactment of the 1920 Act vessels of the types exempted from documentation by section 4385 of the Revised Statutes, and by the Act of April 18, 1874, *supra*, have continued, without documentation, to perform their accustomed functions in the movement of our domestic commerce. See Customs Regulations (1923 Ed.), Art. 17. This practical construction of section 27 is amply supported by its legislative history and declared purpose.

You have not specifically asked me whether vessels of the classes now under consideration may engage in the coastwise trade if not built in this country and owned by American citizens, and I have not considered whether any vessels of these classes may engage in the coastwise trade if not so built and owned. With this qualification, I am of the opinion that vessels exempted from the requirements of documentation by section 4385 of the Revised Statutes, and the Act of April 18, 1874, *supra*, may continue to engage in the coastwise trade and that merchandise transported on them is not subject to forfeiture.

2. *Foreign-built vessels wrecked on the coasts of the United States.*

Section 4136 of the Revised Statutes (Act of December 23, 1852, c. 4, 10 Stat. 149), not in Title L, provides that the Secretary of the Treasury may issue a register or enrollment for any foreign-built vessel wrecked in the United States, when purchased and repaired by a citizen of the United States, where the repairs are equal to three-fourths of the cost of the vessel when so repaired. This section represented an exception to the provisions of sections 4132 and 4312,

which limited, with certain other exceptions here immaterial, the privileges of documentation to "vessels built within the United States." Section 4136 was repealed by the Act of February 22, 1906, c. 500, 34 Stat. 17. By the Act of February 24, 1915, c. 57, 38 Stat. 812 (U. S. C., Title 46, sec. 14), section 4136 was reenacted and revised to provide that a register or enrollment may be issued for any vessel wrecked on the coasts of the United States or her possessions or adjacent waters, when purchased by a citizen of the United States or her possessions and repaired in a shipyard in the United States or her possessions, where the repairs are equal to three times the salved value of the vessel.

Nothing in section 4347 of the Revised Statutes, either as originally enacted or as amended by the Act of February 17, 1898, *supra*, prevented vessels coming within the description of section 4136, or the Act of February 24, 1915, from engaging in the coastwise trade. If section 27 of the 1920 Act is to be given a more drastic effect than that given to its predecessor statutes, the effect will be to deprive American shipbuilders of the business of making repairs which they have heretofore secured by reason of the provision which has made it possible to employ foreign-built vessels in the coastwise trade when they have been wrecked on our coasts and repaired, to the requisite extent, in our shipyards. In my opinion the revision of section 4347, as amended by section 27 of the Act of 1920, was not intended to change the law as to such vessels.

Much of the discussion above with respect to undocumented vessels is applicable to the effect of section 27 upon section 4136 of the Revised Statutes, as amended by the Act of 1915. The legislative history of section 27 indicates clearly enough that it was not intended to affect vessels coming within the description of the Act of 1915. Indeed, it does not seem that the words "vessels built in * * * the United States" in section 27 were intended to add anything to the coastwise laws that was not expressed by the similar words used in section 4132 of the Revised Statutes. Moreover, vessels repaired in American shipyards to the extent prescribed by the Act of 1915 may well be regarded as vessels built within the United States within the long-

established policy of confining the American coastwise trade to American-built vessels.

I am confirmed in this conclusion by the fact that your Department has, since 1920, continued to enroll for domestic trade vessels coming within the description of the Act of 1915. Article 11 of the Customs Regulations (1923 Edition), which are now in force, specifically provides that such vessels are entitled to enrollment.

The conclusion above reached does not conflict with the result reached in the opinion of the Attorney General in the case of the steamship *China*. (33 Op. 1.) Although the application to the present case of all of the reasoning of that opinion might lead to a contrary conclusion, the vessel there involved was of a class specifically dealt with by sections 22 and 37 of the Merchant Marine Act of 1920, and, consequently, there were strong reasons for holding that those sections impliedly repealed the prior inconsistent legislation on the same subject matter.

It is, therefore, my opinion that the provisions of the Act of February 24, 1915, *supra*, are not affected by section 27 of the Act of 1920.

3. *Foreign-built vessels forfeited for breach of the laws of the United States.*

Section 4132 of the Revised Statutes as originally enacted (Act of December 31, 1792, c. 1, 1 Stat. 287, 288) provided:

"Vessels built within the United States, and belonging wholly to citizens thereof, and vessels which may be captured in war by citizens of the United States, and lawfully condemned as prize, or which may be adjudged to be forfeited for a breach of the laws of the United States, being wholly owned by citizens, and no others, may be registered as directed in this Title."

It has always been understood that the vessels enumerated in this statute could be enrolled and licensed to engage in the coastwise trade because of the provisions of section 4312 of the Revised Statutes, which permit the enrollment of vessels having the qualifications required for registration.

By the Panama Canal Act of August 24, 1912, c. 390, sec. 5, 37 Stat. 562 (U. S. C., Title 46, sec. 11), R. S. section

4132, was amended.⁵ The amendment admits to American registry, in addition to the classes specified in R. S. sec. 4132, certain "seagoing vessels, whether steam or sail, * * * wherever built, which are to engage only in trade with foreign countries or with the Philippine Islands and the islands of Guam and Tutuila * * *." Then follows this sentence:

"Foreign-built vessels registered pursuant to this Act shall not engage in the coastwise trade; * * *."

The question arises whether the sentence quoted was intended to prohibit the use in the coastwise trade of all classes of foreign-built vessels embraced by section 4132, including those which "may be adjudged to be forfeited for a breach of the laws of the United States."

The main purpose of the 1912 amendment of R. S. 4132 was quite obviously to admit a new class of vessels to American registry, and in so doing to limit their operations to foreign trade and the insular trade defined in the Act. There was no apparent purpose to amend the section in its application to those classes of vessels to which it had in terms applied since the enactment of the original statute in 1792, and the limitations imposed upon foreign-built vessels first admitted to registry pursuant to the provisions of the amendment were not imposed upon the classes of vessels admissible under the original statute. Without verbal change, the original Act was reenacted in the amendatory Act. Under these circumstances the courts would be slow to place upon the amendment a construction going far be-

⁵ By this Act, R. S., section 4132, is amended to read as follows, in part:

"Vessels built within the United States and belonging wholly to citizens thereof; and vessels which may be captured in war by citizens of the United States and lawfully condemned as prize, or which may be adjudged to be forfeited for a breach of the laws of the United States; and seagoing vessels, whether steam or sail, which have been certified by the Steamboat-Inspection Service as safe to carry dry and perishable cargo, not more than five years old at the time they apply for registry, wherever built, which are to engage only in trade with foreign countries or with the Philippine Islands and the islands of Guam and Tutuila, being wholly owned by citizens of the United States or corporations organized and chartered under the laws of the United States or of any State thereof, the president and managing directors of which shall be citizens of the United States or corporations organized and chartered under the laws of the United States or of any State thereof, the president and managing directors of which shall be citizens of the United States, and no others, may be registered as directed in this title. Foreign-built vessels registered pursuant to this Act shall not engage in the coastwise trade; * * *."

yond its obvious purpose and repealing an exception to our coastwise laws consistently recognized by statute since the enactment in 1793 of the provisions of section 4312 of the Revised Statutes, extending the right of enrollment to vessels qualified for registry under R. S. 4132.

The quoted sentence refers only to vessels "registered" pursuant to the Act, and does not by its terms prevent the *enrollment, or license*, of foreign-built forfeited vessels. Generally speaking, throughout the laws relating to domestic and foreign commerce, the words "registered" and "enrolled" are used in their technical sense, the former referring only to documentation for the foreign trade, and the latter referring only to documentation for the coastwise trade. See *Maul v. United States*, *supra*, p. 508; *Anderson v. United States*, *supra*, p. 199. This literal construction leaves the law unchanged with respect to vessels captured in war or forfeited for violation of law and at the same time leaves the newly created class of registered vessels subject to all the restrictions which Congress intended to impose upon them.

This is the construction of the Act which has been consistently followed by your Department. Article 11 of the Customs Regulations of 1923, now in force, provides that vessels forfeited for breach of the laws of the United States and owned by citizens of the United States, are entitled to enrollment. The same provision was contained in Article 10 of the Customs Regulations of 1915. In view of the apparent purpose of the Amendment of 1912, and the administrative interpretation thereof which accords with that purpose, I am of the opinion that R. S. 4132 as amended does not prohibit such vessels from procuring enrollment and engaging in the coastwise trade.

For reasons discussed in considering vessels exempted from requirements of documentation and vessels wrecked on the coasts of the United States, I am of the opinion that neither the Act of February 17, 1898, nor section 27 of the Act of 1920 excludes from enrollment or participation in the coastwise trade vessels forfeited for breach of the laws of the United States. In this conclusion I am supported by the purpose of these Acts, their legislative history, and

the construction put upon them by the executive Departments having charge of their administration.

It is, therefore, my opinion that all of the classes of vessels about which you ask may continue to engage in the coastwise trade, and that merchandise transported on them is not subject to forfeiture.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF COMMERCE.

APPLICATION FOR LICENSE FOR POWER PROJECT NEAR
CUMBERLAND FALLS, KY.

The Federal Power Commission has jurisdiction to entertain the application of the Cumberland Hydro-Electric Power Company for a license to construct a dam on the Cumberland River, in Kentucky, near Cumberland Falls. The Commission should grant such license unless the effect of the dam would be to impair substantially the navigable capacity of the lower reaches of the river.

In dealing with applications for licenses under the Federal Water Power Act the Federal Power Commission is required to determine the fact of navigability of any given stream. The Attorney General renders opinions only on questions of law, and it would not be in accordance with precedents to submit to him a statement of the evidence and ask for his opinion as to the navigability of a particular stream.

In entertaining applications for licenses the Federal Power Commission should look only to the effect of the proposed project upon interstate and foreign commerce, and it should not refuse a license because of scenic, recreational, or like considerations.

The granting of a license by the Federal Power Commission to the Cumberland Hydro-Electric Power Company to construct a dam on the Cumberland River near Cumberland Falls would not operate to interfere in any way with the power of the State of Kentucky to acquire, under the power of eminent domain, the site of the proposed dam and the adjacent lands for recreational or park purposes.

Recent Kentucky legislation, referred to herein, looking toward the acquisition by the State of an area including Cumberland Falls for park purposes, does not supersede or terminate the authority or duty of the Federal Power Commission with respect to the application for a license for the proposed Cumberland Falls project.

DEPARTMENT OF JUSTICE,

July 1, 1930.

SIR: I have the honor to comply with your request for my opinion on certain questions submitted in the letter of the Secretary of War, as Chairman of the Federal Power Commission, dated August 24, 1929, which were later amended by his letter of October 18, 1929, and added to by letter of the Secretary of the Interior, as Acting Chairman of the Commission, dated March 26, 1930, relating to the application by the Cumberland Hydro-Electric Power Company for a license to carry out a certain project on the Cumberland River in Kentucky, in the vicinity of Cumberland Falls.

The questions submitted are as follows:

"1. Does the jurisdiction of the Federal Power Commission extend to entertaining on their merits applications for the licensing of dams and like works in any nonnavigable stream whose waters flow into a navigable stream?

"2. May the navigable capacity of a given stream be determined as a question of law by your Department, upon a statement of the evidence, or is it a question of fact to be determined by the Commission in the first instance and later by the Court?

"3. On the hypothesis that the Federal Power Commission has jurisdiction to entertain and pass upon an application for a license for a dam or other structure in a non-navigable stream, is it the duty of the Commission to grant such license in a case wherein it finds that the interests of interstate or foreign commerce would be promoted by the proposed construction on account of the improved resulting navigable capacity of the lower and navigable reaches of the same stream; and this, despite the fact that the Commission, if it were to consider such æsthetic, recreational, economic, and other features of the situation as fall within the scope of the functions of the State governments and not of the National Government, would conclude that the public interest, regarded as a whole, would be best served by denying the application for a license?

"4. In respect of the pending Cumberland Falls project, may the Commission properly be influenced in its decision upon the pending application by the fact, if it finds it to

be a fact, that there is public need for a recreational and scenic park at Cumberland Falls; that the pending project would be detrimental to such a park; and that, on the whole, the consideration just suggested is entitled to outweigh the advantage of a slightly improved navigable capacity of the lower Cumberland River, resulting from the effectuating of the project?

"5. In cases in which the construction of a dam or other work across or in a nonnavigable stream is contemplated and a license is sought therefor of the nature mentioned and provided for in section 23 of the Act of June 10, 1920 (41 Stat. 1075; U. S. C., Title 16, sec. 817), has the Federal Power Commission authority and jurisdiction to grant such a license as may justly protect or tend to protect the licensee against interference by authorities of the State government, in respect of the work mentioned in the license, or may the Commission only grant a license evidencing the fact that the Federal Government interposes no objection to the construction and operation of the proposed work, provided that such conditions as are expressed in the license are complied with; and what is the true nature of the license contemplated in the statutory provision referred to?

"6. Whether any jurisdiction that the Commission may have possessed relative to the proposed project has been superseded or terminated by two statutes enacted by the Legislature of Kentucky on March 10, 1930, looking toward the acquisition by the State of an area including Cumberland Falls for State park purposes?"

Some of these questions are general in form, but as they arise from the application of the Cumberland Hydro-Electric Power Company for a license on the Cumberland River in Kentucky and relate to that matter, this opinion, in accordance with established precedents, will be confined to the particular case submitted.

From the papers submitted it appears that the project referred to involves the erection of a dam on the Cumberland River near Cumberland Falls and the development of hydro-electric power at that point. At and near the site of the proposed dam the Cumberland River is not navigable. In its lower reaches it is navigable and available as a highway of interstate commerce. No reservation and no part

of the public domain are involved, and the interest of the United States depends entirely on the Commerce Clause of the Constitution and the right thereunder to prevent obstruction to or to improve navigable highways of interstate or foreign commerce. This project (No. 389) first came before the Federal Power Commission on February 10, 1923, when there was filed with the Commission a declaration of intention to construct the dam. The proceedings before the Commission were pursuant to that part of section 23 of the Federal Water Power Act which is as follows:

"That any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce between foreign nations and among the several States, may in their discretion file declaration of such intention with the commission, whereupon the commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not proceed with such construction until it shall have applied for and shall have received a license under the provisions of this Act. If the commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws." (41 Stat. 1075.)

On February 13, 1923, the declarants were advised that the Cumberland River was navigable and that they should file application for a preliminary permit. This was filed on March 8, 1923, and a preliminary permit was granted on March 24, 1924. On March 17, 1926, application for a license was filed, and is still pending. On June 14, 1929 (see Ninth Annual Report, pp. 101-102), the Commission found that the Cumberland River at the point involved in the project affecting Cumberland Falls is not navigable waters but that the navigability of navigable sections of the

river, and consequently the interests of interstate and foreign commerce, would be affected by the proposed construction. This finding was based on the following statement of facts (Ninth Annual Report, p. 102) :

“The application for license contemplates a dam 80 feet high to create a reservoir with a capacity of about 46,000 acre-feet, a diversion tunnel, and a power house with initial and ultimate installation capacities of 40,000 horsepower and 80,000 horsepower, respectively. The capacity of the proposed reservoir is sufficient to retain the entire monthly flows of 20 out of the 108 months which comprise the period from 1918 to 1927. The plant, if operated to supply peak loads during the low-water stages of the river, would have capacity to produce such waves in the river at the gaging station near Burnside as would vary the navigable depth approximately 2 feet for the initial installation and 4 feet for the ultimate installation. The variation in navigable depths at Nashville under similar conditions of operation would be three-fourths to $1\frac{1}{4}$ feet. The variations in the navigable depths reaching a magnitude of 2 feet in a 6-foot project would, *if not appropriately regulated, materially interfere with navigation in the channels so affected.* It is concluded, therefore, that the section of Cumberland River involved does not constitute navigable waters within the definition of the Federal Water Power Act, but that the proposed project would affect the navigable capacity of the navigable sections of the river and, consequently, the interests of interstate or foreign commerce.” (Italics ours.)

I

The first question submitted is whether the Commission has jurisdiction to entertain on its merits the application for license for this dam on upper nonnavigable reaches of the Cumberland River.

Section 10 of the Act of March 3, 1899 (c. 425, 30 Stat. 1121, 1151), which is still in force, is as follows:

“SEC. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or com-

mence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

This statute applies to the construction of works upon a nonnavigable portion of a stream which would impair the navigable capacity of lower navigable portions thereof. In *United States v. Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, the United States succeeded in enjoining the construction of a dam on the nonnavigable portions of the Rio Grande River, the effect of which would have been to impair the navigable capacity of the lower navigable portions of the river.

Under the provisions of Article I, section 8, clause 3, of the Constitution of the United States, which empowers Congress to regulate commerce with foreign nations and among the several States, Congress has power to control and protect navigation on streams suitable for interstate and foreign commerce, and in the exercise of that power it is settled, as in *United States v. Rio Grande Dam and Irrigation Co.*, above cited, that Congress has the right to prevent or abate dams or other structures on the upper nonnavigable reaches of rivers the effect of which is to impair the navigable capacity of the lower navigable portions of the stream. It also has power to provide for the erection of dams in the upper nonnavigable portions of a stream for the purpose of improving navigation on lower reaches, when the navigable portions of the stream are available for interstate or foreign commerce.

It was because of these powers and what may be done under them that the above-quoted portion of section 23 of the Federal Water Power Act was enacted. Construction of a dam on the upper nonnavigable part of a stream which in its lower reaches is a highway of interstate commerce subjects the owner of the dam to the risk of being assailed on the ground that his dam has an injurious effect on commerce. His investment is subject to this hazard. The provisions in section 23 above quoted were intended, among other things, to enable those proposing to construct such a dam to obtain a ruling from an agency of the Federal Government in advance of construction as to whether the proposed structure would injure the navigable capacity of lower navigable portions of the stream. The statute does not require those proposing to erect such a dam to file application for license with the Federal Power Commission; if they choose to proceed without a license and take the risk of later proceedings by the Federal Government to enjoin the maintenance of their dam, they are at liberty to do so. The Act provides that any persons intending to build a dam "may in their discretion" proceed before the Commission. Where it is thus proposed to construct a dam across the nonnavigable portions of a stream, and a declaration of intention is filed, the Act contemplates that the Commission shall first determine whether the interests of interstate or foreign commerce would be affected by such proposed construction. This requires an inquiry by the Commission as to whether the waters of the stream in which the dam is to be erected flow into navigable waters on which interstate or foreign commerce is conducted, and if so, whether the construction of the dam would directly and substantially affect the navigable capacity of the lower navigable waters and thus affect the interests of interstate or foreign commerce. If it finds that such conditions exist, it is the duty of the Commission to entertain an application for a license and, if it appears that the proposed dam, if properly constructed and operated, would not substantially and directly injure navigation, to grant a license. Having power to prevent the erection in nonnavigable waters of any structure which would substantially impair the navigable capacity of the lower reaches of the stream, I see no reason to doubt that Congress has

power to establish a tribunal, as has been done by this Act, to make, in advance of construction, a finding or ruling at the request of those desiring to build such structures so that they may know in advance of construction whether they are likely to be interfered with by the Federal Government.

On the facts submitted, I am of the opinion that the Commission has jurisdiction to entertain the application of the Cumberland Hydro-Electric Power Company for a license to carry out its project on the Cumberland River.

II

The next question submitted is whether the navigable capacity of a given stream may be referred to and determined by the Attorney General upon a statement of the evidence, or whether it is a question of fact to be determined by the Federal Power Commission.

Whether a stream is navigable is a mixed question of law and fact. The first step is to determine what is the definition or test of navigability. The next step is to apply that test to the facts of the case. If there were any doubt as to the definition or test of navigability, it might be appropriate to submit to the Attorney General a request for an opinion on that point, but that is a matter long since settled by the courts. In *United States v. Holt State Bank*, 270 U. S. 49, 56, it was said:

“The rule long since approved by this Court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce. *The Montello*, 20 Wall. 430, 439; *United States v. Cress*, 243 U. S. 316, 323; *Economy*

Light & Power Co. v. United States, 256 U. S. 113, 121; *Oklahoma v. Texas*, 258 U. S. 574, 586; *Brewer-Elliott Oil & Gas Co. v. United States*, *supra*, p. 86."

With this test of navigability established, the question whether a particular stream is navigable becomes one of fact. Not only the evidentiary facts, but the ultimate fact of navigability is one which, in dealing with applications for license, the Federal Power Commission is required by this Act to determine. It has long been settled that the Attorneys General will render opinions only on questions of law, and it would not be in accordance with precedents to submit to the Attorney General a statement of the evidence and ask for his opinion as to the navigability of a particular stream.

III

The next questions submitted are whether in considering applications for licenses the Commission must confine its attention to the interests of interstate and foreign commerce, or whether it may consider, in deciding whether to grant a license, æsthetic, recreational, scenic, and other like features of the situation.

There is nothing in section 23 of the Federal Water Power Act or any other provision of the law that authorizes the Commission to deny or grant a license in a case like that under consideration because of æsthetic, recreational, scenic, or like considerations. To construe the statute to allow the Commission to take such matters into consideration would raise very grave doubt as to its validity. Where, as in the case of Cumberland Falls, no part of the public domain and no national reservations are involved, the power of the Federal Government rests wholly on the Commerce Clause and the consequent power to control and improve navigation on streams suitable for interstate and foreign commerce.

A similar question was considered by Attorney General Wickersham in an opinion rendered to the Secretary of War on April 6, 1909 (27 Op. 284), on a question arising on an application under section 10 of the Act of 1899 for permission to erect a dolphin off the coast of Santa Barbara, Cali-

fornia, which was opposed on the ground that oil would be spilled, which would result in great injury to the bathing resort on the beach at Santa Barbara. In that opinion he said:

“With respect, therefore, to your further inquiry as to whether or not, in passing upon the placing of obstructions in the navigable waters of the United States, the Secretary of War and the Chief of Engineers may, in the application of authority which is conferred in the enactment above cited, consider questions relating to other interests than those having to do with the navigation of the waters in which the obstruction is placed, I must express the opinion that no such consideration should be entertained, and that the mere fact that the placing of a structure in navigable waters might occasion an incidental injury to a bathing beach or the impairment of bathing facilities, or other reasons of similar character not having direct relation to the navigable capacity of the waters or their use to the prosecution of interstate and foreign commerce, should not operate to prevent the approval of a plan otherwise proper and which would otherwise meet with the approval of the Chief of Engineers and the Secretary of War.”

The United States has no power to prevent the erection of a dam at Cumberland Falls unless the effect of the dam would be to impair substantially the navigable capacity of the lower reaches of the river. It could not prevent the erection of the dam because it would interfere with the scenic or recreational facilities at that point, and Congress has not by the terms of this Act attempted to confer upon the Commission the power to refuse a license because of such considerations.

I am of the opinion that in entertaining this application for license under the provisions of section 23 of the Act above quoted the Commission must look only to the effect of construction upon interstate and foreign commerce.

IV

The last questions submitted are whether the Federal Power Commission has jurisdiction to grant a license purporting to protect the licensee against interference by the

authorities of the State government, and, in that connection, whether the steps taken by the State of Kentucky looking toward the acquisition by the State for park purposes of an area including Cumberland Falls operate to terminate the authority of the Commission relative to the proposed project.

It appears that on March 10, 1930, the Legislature of Kentucky passed a statute authorizing the Kentucky State Park Commission to acquire, through the exercise of the power of eminent domain, lands and waters having scenic beauty or material or recreational utility or other features for park purposes, and on the same date passed another statute accepting an offer of a donation of \$230,000 for the acquisition for park purposes of some 2,200 acres, including the site of Cumberland Falls, and directing the Kentucky State Park Commission to purchase, within the limits of \$230,000, the site of Cumberland Falls and adjacent lands or, failing purchase within three months from the passage of the Act, to institute proceedings to acquire the property by the exercise of the power of eminent domain. I am advised that the purchase has not been made, but have no information as to whether the condemnation proceedings have been instituted or whether the sum offered to be donated is sufficient to acquire the property and, if not, whether any provision for additional funds has been made by the State of Kentucky.

The questions presented by your inquiry, raised by the facts of this case, are whether the granting of a license by the Commission on the application of the Cumberland Hydro-Electric Power Company would operate to defeat the State's proposal to acquire the property through the exercise of the power of eminent domain, and whether, on the other hand, the action by the State of Kentucky diminishes the power of the Commission to proceed and act upon the application and grant it if the other facts justify it.

The effect of the license, as between the licensee and others than the United States, would ordinarily be a judicial question and one not for the Commission or me to determine, but the Commission has to pass on the form and conditions of the license, and in so far as the form of it is to be determined by its effect, it is appropriate to consider its possible effect.

I think it is clear that the granting of a license by the Commission to the Cumberland Hydro-Electric Power Company to construct a dam near Cumberland Falls would not operate to interfere in any way with the State's power to acquire the property by proceedings under the power of eminent domain for recreational or park purposes. No finding has been made by the Commission under section 21 of the Federal Water Power Act that the construction of the proposed dam would improve or develop navigation on the lower stretches of the Cumberland River, and so the licensee could hardly claim to be an agency chosen by the Government to erect works to improve navigation. As to what the effect of a license might be in protecting the licensee from interference by the State, in the case of a structure erected pursuant to such a finding of the Commission for the purpose of improving navigation, it is not necessary here to consider.

On the facts of this case a license could not, under the terms of the Act, be made to operate in any way to prevent the acquisition by the State of Kentucky for park or other purposes, under its power of eminent domain, of the site of the proposed dam and the adjacent lands, either before or after the erection of the dam. Where, as in this case, the license may be granted for the erection of a dam on the nonnavigable portions of a stream on the ground that such structure, if built and operated in a specified way, would not substantially injure navigation on the lower reaches of the stream, and that is all that is involved, the license amounts to nothing more than evidence of the fact that so far as the United States is interested or concerned there is no objection to the proposed construction. The license should not purport to render the licensee immune from the exercise by the State of its lawful power and, so far as the conditions of the license are concerned, the State should be left free to do as it likes about the acquisition of the property for park or other purposes.

On the other hand, it is clear that the statutes which have been recently passed by the Legislature of Kentucky, above referred to, do not supersede or terminate the authority or duty of the Commission with respect to the application for a license. If the action by the State of Kentucky looking to the acquisition of this property for a park

had proceeded to a point where the early acquisition of the property by the State was a certainty, no doubt the Commission might refrain from further proceedings on the application upon the ground that further action would be futile. Under such conditions I can not imagine that the applicant would press its application. The information so far submitted does not make it certain that the State will ever acquire the property. The mere fact that such an acquisition is a possibility or probability is not sufficient to justify the Commission in refusing to perform the duties imposed by this statute.

In the absence of the actual acquisition by the State, or of facts showing that such acquisition is a certainty in the near future, it is the duty of the Commission to pass on the application and grant or deny it as the facts may require. Otherwise, the State might withhold action indefinitely in the matter of the acquisition of the property, and the Commission would be withholding action indefinitely on the application for a license, and the applicant, not being able to proceed without a license, would be deprived indefinitely of the use of its property.

Respectfully,

WILLIAM D. MITCHELL.

To the PRESIDENT.

AGRICULTURAL MARKETING ACT

The Agricultural Marketing Act (46 Stat. 11), extends to the Territories of Alaska, Hawaii and Porto Rico, but does not extend to the Philippine Islands.

Associations dealing solely in intrastate as distinguished from interstate commerce are not "cooperative associations" within the definition in the first sentence of section 15(a) of the Agricultural Marketing Act but the Federal Farm Board is authorized to loan money to them in case the conditions specified in the second sentence of that section exist.

The proposed organization of agricultural producers referred to herein, which is to be formed under the general incorporation laws of a State and whose membership will consist of cooperative associations instead of individual producers, is a cooperative association, qualified under the Capper-Volstead Act (42 Stat. 388), and therefore is a cooperative association within the meaning of the Agricultural Marketing Act, *supra*.

The Federal Farm Board is without authority to make loans for the sole purpose of refinancing mortgages on existing facilities.

"Naval stores," defined in the Naval Stores Act (42 Stat. 1435), are not agricultural commodities within the meaning of the Agricultural Marketing Act and hence the Federal Farm Board has no authority to deal with an organized group of producers of naval stores.

DEPARTMENT OF JUSTICE,

August 11, 1930.

SIR: I have the honor to comply with your request for my opinion upon several questions stated in your letters of October 17, 1929, and July 11, 1930, arising in the administration by the Federal Farm Board of the Agricultural Marketing Act, approved June 15, 1929, c. 24, 46 Stat. 11.

I

The first question submitted is as follows:

"Mr. Felix Cordova Davila, Resident Commissioner of Porto Rico, presents to Federal Farm Board the question as to whether Agricultural Marketing Act of 1929 extends to and is operative within Porto Rico, and whether Porto Rican Producers of an agricultural product can obtain the benefits of the Act. The producers referred to are represented to be otherwise qualified, the sole question being as to whether or not the Act does in fact extend to and whether it is operative in Porto Rico.

"This raises a question of underlying importance, and if this request is in proper shape we will appreciate your opinion if we are entitled to the same upon the question as to whether or not Agricultural Marketing Act does extend to Porto Rico; and as the question is sure to arise shortly as to whether the Act extends to Alaska, Hawaii, and Philip-pines, the answer may properly include them also."

The policy of the Agricultural Marketing Act, declared in section 1 of the Act, is to promote the effective merchandizing of agricultural commodities in interstate and foreign commerce by minimizing speculation, by preventing wasteful methods of distribution, by encouraging the organization of producers for unity of effort in marketing their products, by promoting and financing a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies, and by aiding in the prevention

and control of surpluses in agricultural commodities, so as to maintain advantageous domestic markets and prevent such surpluses from causing undue and excessive fluctuations or depressions in prices for these commodities. The Federal Farm Board, constituted under the Act, is expressly charged with executing its powers only in such manner as will in its judgment aid to the fullest practicable extent in carrying out this policy.

The Board is expressly authorized to promote and encourage the organization, development and improvement of effective cooperative associations, and to make investigations and reports regarding various factors affecting the market for agricultural products, including supply and demand, and the economic utilization of land for agricultural purposes. It is also charged with the administration of a revolving fund of \$500,000,000, from which it is authorized to make loans to cooperative associations for stated purposes. It may enter into agreements for the insurance of such associations against loss through price declines and may make advances from the revolving fund to meet obligations under these agreements which are to be repaid from premiums paid for the insurance.

The term "cooperative association," as used in the Act, is defined as including any association qualified under the Act entitled "An Act to authorize association of producers of agricultural products," approved February 18, 1922.

The Organic Act of Porto Rico of April 12, 1900, section 14, 31 Stat. 77, 80, commonly known as the Foraker Act, and the Organic Act of March 2, 1917, section 9, 39 Stat. 954, commonly known as the Jones Act, provide in part as follows:

"* * * the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws * * *."

Provisions precisely similar in legal effect are contained in the Organic Acts of Alaska and of Hawaii, 37 Stat. 512, 31 Stat. 141.

In contrast to these provisions, common to the Acts under which Porto Rico, Alaska and Hawaii were organized as Territories of the United States, the Organic Act of the Philippine Islands of August 29, 1916, section 5, 39 Stat. 545, 547, provides in part as follows:

“* * * the statutory laws of the United States
* * * shall not apply to the Philippine Islands, except when they specifically so provide, or it is so provided in this Act.”

The Agricultural Marketing Act is made applicable to the merchandising of agricultural commodities in interstate and foreign commerce, without territorial limitation. In express terms it neither includes nor excludes Alaska, Hawaii, Porto Rico or the Philippine Islands. It can have no application to the Philippine Islands because of the provision in the Organic Act of the Islands above quoted. On the other hand, in Porto Rico, Alaska and Hawaii it has application under the provisions of their Organic Acts, unless its provisions are locally inapplicable in these Territories or unless from its own terms a contrary intention is to be inferred. There are in this statute no provisions which cannot be carried into effect as well in Alaska, Hawaii and Porto Rico as in the States of the United States; nor is there anything in the history of these Territories to indicate that the extension of Governmental aid under the terms of this statute to agricultural industries would in any way be incompatible with their existing institutions, laws or customs. There is, indeed, no perceivable reason for holding this statute “locally inapplicable” in any of these Territories within the meaning of the Acts under which they were organized.

By virtue of the broad language in these Organic Acts, the laws relating to the organization and powers of National Banks have been held to have the same force and effect in Alaska, Porto Rico and Hawaii as they have in the States of the United States. 19 Op. 678; 23 Op. 169; 23 Op. 177. For the same reason our trademark laws are held to extend to Porto Rico, (23 Op. 634) and it may be said that all such laws of general character and universal

application are applicable in such Territories unless the legislative intent that they should have only specific application elsewhere is made to appear. *Hornbuckle v. Toombs*, 18 Wall. 654. Thus, for example, the Sheppard-Towner Maternity Act of November 23, 1921, 42 Stat. 224, approved the appropriations therein made specifically and exclusively to the States, and it was necessary by special Act (43 Stat. 17) to extend its benefits to Hawaii.

There are no provisions to be found in the Agricultural Marketing Act which impose specific limitations upon its application, nor is any such limitation to be implied from any of its terms or from its general purpose. On the contrary, there are references in the Act to the Territories which clearly import an intention that the Act should have application in the Territories of the United States. Thus, in section 9 (a) with respect to stabilization corporations, it is provided that the Board may upon application of an advisory committee for any commodity recognize as a stabilization corporation for the commodity any corporation if, among other things, "the Board finds that the corporation is duly organized under the laws of a State or Territory." And in section 13 (c) it is provided that "the Board may cooperate with any State or Territory, or department, agency, or political subdivision thereof, or with any person."

Alaska and Hawaii are fully organized Territories, duly incorporated into the United States. Section 1, Act of August 24, 1912; 37 Stat. 512; sections 1 and 2, Act of April 30, 1900, 31 Stat. 141. *Rasmussen v. United States*, 197 U. S. 516; *Commission v. Humboldt*, 224 U. S. 474; *Downes v. Bidwell*, 182 U. S. 244, 305. On the other hand, Porto Rico is territory which has not been incorporated into the Union as distinguished from merely belonging to it and therefore subject to its sovereignty. *Balzac v. Porto Rico*, 258 U. S. 298, 305. It is, however, a completely organized Territory. *Kopel v. Bingham*, 211 U. S. 468, 476; *Gromer v. Standard Dredging Co.*, 224 U. S. 362, 370. Its government possesses "in all essential matters a strong likeness to the powers usually given to organized Territories, and moreover a striking similarity to the Organic Act of the Hawaiian Islands." *Porto Rico v. Rosaly*, 227 U. S. 270, 274. It is specifically de-

scribed as a "Territory" in the Act of September 21, 1922, 42 Stat. 993, which extended the National Prohibition Act to Porto Rico. The intention that the Act shall have effect in the Territories of Alaska, Hawaii and Porto Rico is clearly to be inferred from the language of the Act.

But it is suggested that a contrary intent is to be inferred, at least with reference to Porto Rico, from the phrase "in the United States," occurring in the definition of "surplus" contained in subdivision (b) of section 1, as follows:

"There shall be considered as a surplus for the purposes of this Act any seasonal or year's total surplus produced in the United States, and either local or national in extent, that is, in excess of the requirements for the orderly distribution of the agricultural commodity or is in excess of the domestic requirements for such commodity." The same phrase occurs in section 2, providing that in making appointments to the Federal Farm Board the President should give due consideration to "having the major agricultural commodities produced in the United States" fairly represented upon the Board, and also in section 4, providing that the Board shall maintain its principal office in the District of Columbia and such other offices in the United States as are necessary.

Although not a part of the United States in a Constitutional sense, Porto Rico is an insular possession, subject to and governed by the sovereignty of the United States, and is a Territory of the United States. But even if the phrase "in the United States," where used in this statute, could be held to exclude Porto Rico, these phrases do not limit the general application of the statute but refer merely to the computation of "surplus," the personnel of the Board, and the location of its offices. Nor can the fact, disclosed in the legislative history, that Congress was primarily concerned with relieving economic conditions affecting the agricultural industry in the States defeat the provisions contained in the Organic Acts of these Territories under which this law, made applicable in general terms to the agricultural industry, without territorial limitation, must be effective in Alaska, Hawaii and Porto Rico. A contrary intent can not be inferred from phrases of doubtful implication having no intended application to the question.

I am therefore of the opinion that the Agricultural Marketing Act extends to the Territories of Alaska, Hawaii and Porto Rico, but does not extend to the Philippine Islands.

II

The next question submitted is as follows:

"A number of cooperative associations have applied to the Board for loans where the record showed that the cooperative in question was a truly cooperative association marketing agricultural products but that the association in question deals solely in intrastate as distinguished from interstate commerce. Is such a cooperative association qualified under the Act to borrow money from Federal Farm Boards?"

Section 15 (a) of the "Agricultural Marketing Act" defines "cooperative associations" authorized to receive loans under the provisions of the Act as follows:

"As used in this Act, the term 'cooperative association' means any association qualified under the Act entitled 'An Act to authorize association of producers of agricultural products,' approved February 18, 1922 * * *."

The same section then provides:

"* * * Whenever in the judgment of the board the producers of any agricultural commodity are not organized into cooperative associations so extensively as to render such cooperative associations representative of the commodity, then the privileges, assistance, and authority available under this Act to cooperative associations, shall also be available to other associations and corporations producer-owned and producer-controlled and organized for and actually engaged in the marketing of the agricultural commodity. No such association or corporation shall be held to be producer-owned and producer-controlled unless owned and controlled by cooperative associations as above defined and/or by individuals engaged as original producers of the agricultural commodity."

I am of the opinion that an association dealing solely in intrastate as distinguished from interstate commerce is not a "cooperative association" of the sort described in the Act

of February 18, 1922, referred to herein as the Capper-Volstead Act (42 Stat. 388), and therefore not within the definition in the first sentence of section 15 (a).

Section 1 of the Capper-Volstead Act relates to producers acting together in associations, corporate or otherwise, "in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged." That marketing in "interstate and foreign commerce" is an essential feature of associations which may be regarded as qualified under the Capper-Volstead Act is manifest not only from its language but from the purpose of that Act. Its object was primarily to insure cooperative associations that qualified thereunder immunity from prosecution under the Federal antitrust laws. Those laws apply only to persons engaged in interstate and foreign commerce. There would have been no reason for the enactment of a Federal law to protect persons engaged in the production of agricultural products and dealing solely in intrastate commerce from the operation of the anti-trust laws. Section 2 of the Capper-Volstead Act provides for proceedings by the Secretary of Agriculture against the associations described in section 1 if he "shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof" and for the enforcement of orders made by the Secretary pursuant to such proceedings. The entire Act thus relates to the activities of such associations in interstate and foreign commerce. Agricultural associations and corporations engaged exclusively in intrastate business, such as the one described in this question, are not included in, nor affected by, the Capper-Volstead Act and therefore do not fall within the definition of cooperative associations contained in the first sentence of section 15 (a) of the Agricultural Marketing Act.

The question remains whether associations engaged solely in intrastate commerce are eligible for loans under the alternative provision contained in the second sentence of section 15 (a) in the event that "in the judgment of the Board the producers of any agricultural commodity are not organ-

ized into cooperative associations so extensively as to render such cooperative associations representative of the commodity." This question is not free from doubt.

Both the title of the Act and the declaration of policy contained in section 1 specifically refer to interstate and foreign commerce. The title is "An Act To establish a Federal Farm Board to promote the effective merchandising of agricultural commodities in interstate and foreign commerce, and to place agriculture on a basis of economic equality with other industries." The policy declared in section 1(a) is "to promote the effective merchandising of agricultural commodities in interstate and foreign commerce, so that the industry of agriculture will be placed on a basis of economic equality with other industries, and to that end to protect, control, and stabilize the currents of interstate and foreign commerce in the marketing of agricultural commodities and their food products * * *." All that follows in section 1 (a) is subordinate to the principal clause, just quoted, which refers specifically to interstate and foreign commerce.

On the other hand, the end to be attained, as set forth in this declaration of policy, is "that the industry of agriculture will be placed on a basis of economic equality with other industries." The promotion of effective merchandising of agricultural commodities in interstate and foreign commerce and the protection, control and stabilization of the currents thereof are the primary means selected to attain that end, but there may be other subsidiary means. The Act is not limited to the regulation of interstate and foreign commerce under the Commerce Clause of the Constitution. It also provides for the use of Government funds for the assistance of citizens engaged in activities of public and national concern and therefore for the general welfare of the United States. Several of the powers and functions of the Board relate to matters not necessarily connected with interstate and foreign commerce (sec. 5). The description in the second sentence of section 15 (a) of the associations and corporations to which loans are thereby authorized in the circumstances specified contains no express reference to interstate and foreign commerce but describes the associa-

tions and corporations to which the benefits of the Act may then be extended broadly as "other associations and corporations producer-owned and producer-controlled and organized for and actually engaged in the marketing of the agricultural commodity."

Certain statements made on the floor of the Senate by Senator McNary who, as chairman of the Committee on Agriculture and Forestry, was in charge of the bill in that body, lend some support to the view that it was the intention of Congress that associations need not be engaged in interstate and foreign commerce in order to be within the alternative provision of section 15 (a). These remarks were made in the course of a debate upon an amendment offered by Senator Shortridge (Cong. Rec. Vol. 71, pt. 2, p. 1254) which would have stricken out certain of the provisions of the section of the Senate bill which was identical with section 15 (a) as enacted, and to substitute therefor a new definition of the term "cooperative association." Senator Shortridge stated as one of the primary purposes of his proposed definition the elimination of the requirement that such associations must be qualified under the Capper-Volstead Act and thus engaged in interstate and foreign commerce. The definition proposed in the amendment, however, contained other features which were controversial and provoked active opposition. So far as the debate related to the question here involved, there was substantial agreement among the Senators who spoke that only associations engaged in interstate and foreign commerce could be regarded as qualified under the Capper-Volstead Act. (Id. pp. 1254-1267.) Toward the end of the debate, however, Senator McNary said with respect to the section of the Senate bill corresponding to the present section 15 (a) (id. p. 1267):

"Now, as to meeting the situation: In my opinion this language, properly construed and equitably applied, would meet the situation described by the Senator from California, namely, that if cooperative associations do not come within the provisions of the Capper-Volstead Act, then the provision which permits the board, in its judgment, when co-operatives are not sufficiently organized, to deal with groups who are farm owned and farm controlled, would meet the

condition in California or in any other section of the country. There is nothing in the world, if an organization in California or anywhere else is cooperative in character and is farm owned and farm controlled, that would prevent it having the benefits of the bill. If I did not have that supreme confidence, I would go a long way to meet the conditions suggested by the Senator from California."

Senator Shortridge's amendment was rejected (*id.* p. 1267).

Though the question is a doubtful one, the language of the second sentence of section 15 (a) is broad enough to cover associations not engaged in interstate and foreign commerce and the Act does not, in my judgment, contain sufficient evidence of a contrary intent to justify a conclusion that, in the circumstances described in this alternative provision, they are not eligible to the benefits of the Act.

I am therefore of the opinion that associations dealing solely in intrastate as distinguished from interstate commerce are not "cooperative associations" within the definition in the first sentence of section 15 (a) but that the Federal Farm Board is authorized to loan money to them in case the conditions specified in the second sentence of that section exist.

III

The next question submitted is as follows:

"The proposed federal grain marketing association is composed of producers of grain. It is to be formed under the general corporation laws of the State of Delaware and is not formed under a 'cooperative marketing act,' such as are in force in various States in the United States. It will have a capital stock. It will market in interstate commerce the products of its members. It will not pay dividends on its stock in excess of 8% per annum. It represents that it will not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

"The persons eligible to subscribe for and to hold its stock are farmer-owned grain elevators, grain sales agencies, and grain pools meeting the conditions of the Act of Congress of February 18, 1922, commonly called the Capper-Volstead

Act. Please observe that this centralized marketing agency is (a) formed under the general corporation laws of the State, and (b) has as its members corporations which are required to be Capper-Volstead corporations.

"Statements have been made by persons in high official authority that an injunction suit will be brought to prohibit a loan being made to this cooperative because it is organized under the general laws of the State rather than under a 'cooperative statute' of some State having such a statute. Objection is also made that such a centralized cooperative association as this is not in truth and in fact and can not be a Capper-Volstead Act corporation for the reason that only cooperatives can qualify under the Capper-Volstead Act which are composed of actual producers of agricultural products, and that this particular grain corporation is, and most centralized marketing associations are, composed not of producers but of local associations or groups of producers which are incorporated. In other words, in this grain group and in many other centralized marketing organizations the growers associate themselves together in a local community, forming a cooperative association, which turns its product over to the central association for marketing the same.

"The questions here then sought to be answered are:

"(a) Is a cooperative which is formed under the general incorporation laws of a State instead of under the cooperative laws of a State by that mere circumstance alone to be denied the status of a cooperative association as that term is defined by section 15 (a) of Agricultural Marketing Act?

"(b) Is such a centralized organization as is referred to above, which is composed of local units instead of the individual producers themselves, capable of being construed to be an association as that term is used in Agricultural Marketing Act?"

Section 1 of the Capper-Volstead Act of February 18, 1922, 42 Stat. 388, is as follows:

"Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in inter-

state and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes. *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

"First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

"Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

"And in any case to the following:

"Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members."

With reference to subdivision (a) of this question, I am of the opinion that the mere fact that a cooperative agricultural association is lawfully formed under the general incorporation laws of a given State instead of under a special statute, if there be any, of that State relating to the formation of cooperative associations, would not *per se* exclude such an association from the definition laid down in section 15 (a) of the Agricultural Marketing Act. The Capper-Volstead Act, to which the first sentence of that section refers authorizes producers to "act together in associations, corporate or otherwise, with or without capital stock," and throughout the Act the word "associations" relates back to the expression "associations, corporate or otherwise." The alternative provision contained in the second sentence of section 15 (a) likewise includes "other associations and corporations." Furthermore, the declaration of policy set out in section 1 (a) (3) contemplates the organization of producers "into effective associations or corporations under their own control * * *."

With respect to subdivision (b) of this question, it appears that the stock of the Delaware corporation referred to would be owned entirely by associations or corporations qualified

under the Capper-Volstead Act; that its charter powers would be so limited as to conform to the requirements set forth in the proviso to section 1 of that Act; and that its function would be to market in interstate commerce the products of its members. The question is whether the fact that the membership of this corporation will consist of cooperative associations, rather than of individual producers, deprives it of the status of an "association" eligible to receive the benefits of the Act under the provisions of section 15 (a).

I assume from the facts submitted that this corporation is not a stabilization corporation. One of the requirements for recognition of a corporation as a stabilization corporation for any commodity is that "the board finds that all the outstanding voting stock or membership interests in the corporation are and may be owned only by cooperative associations handling the commodity." (Sec. 9 (a) (3).) And one of the permitted functions of such corporation is to "act as a marketing agency for its stockholders or members in preparing, handling, storing, processing, and merchandising for their account any quantity of the agricultural commodity or its food products." (Sec. 9 (b) (1).) The question, however, does not indicate that this corporation has been recognized by the Board as a stabilization corporation.

The Capper-Volstead Act broadly grants authority to agricultural producers to "act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling and marketing in interstate and foreign commerce" agricultural products. This language fairly imports that such producers, for such purposes, may cooperate through any organization, incorporated or unincorporated, for the accomplishment of the purposes stated, so long as the only persons interested in the organization are producers, and its operations are conducted solely for their mutual benefit. The statute imposes no restriction upon the business forms of cooperation and association which may be employed to effectively organize cooperative associations of agricultural producers for handling and marketing their products. Obviously, it is convenient, if not indeed necessary, to any effective cooperative association, that local associations should act

through centralized marketing agencies in disposing of the products of their members, and that they should, in representation of their members, hold stock in such centralized marketing agencies; I can not doubt, in view of the purpose of the Capper-Volstead Act, that such methods of cooperation and association between agricultural producers were intended to be authorized under the very broad language of this statute.

I am therefore of the opinion that the corporation proposed to be organized is a cooperative association, qualified under the Capper-Volstead Act, and therefore is a cooperative association within the meaning of the Agricultural Marketing Act.

IV

The next question submitted is as follows:

"Has the Federal Farm Board power to make a 'facility loan' under section 7 (c) of the Act to refinance either in whole or in part existing mortgages on facilities now in existence?

"To illustrate: in a recent application for a loan to Ohio Milk Cooperative Association of Cleveland, the best security and in fact practically the only security which they have to offer is a mortgage on facilities, which facilities are now in existence and which are mortgaged for a comparatively small part of their appraised value. The Board feels that their situation is such as to desire to help them, but to do this under the provisions for a facility loan simply means a refinancing proposition.

"The experience of the Board so far indicated that this problem will be constantly arising where the Board is asked not to make a loan to construct or to acquire or to lease a physical facility, but to refinance existing facilities already owned by the cooperative and in substance is nothing more or less than refinancing of outstanding indebtedness on existing facilities."

The purposes for which the Board is authorized to make loans to cooperative associations are set forth in section 7 of the Act. One of them (subdivision (a) (2)) is "the construction or acquisition by purchase or lease of physical marketing facilities for preparing, handling, storing, proc-

essing, or merchandising agricultural commodities or their food products." These loans are made subject to special restrictions provided in subdivisions (c) and (d) as follows:

"(c) Loans for the construction or acquisition by purchase or lease of physical facilities shall be subject to the following limitations:

"(1) No such loan for the construction or purchase of such facilities shall be made in an amount in excess of 80 per centum of the value of the facilities to be constructed or purchased.

"(2) No loan for the purchase or lease of such facilities shall be made unless the board finds that the purchase price or rent to be paid is reasonable.

"(3) No loan for the construction, purchase, or lease of such facilities shall be made unless the board finds that there are not available suitable existing facilities that will furnish their services to the cooperative association at reasonable rates; and in addition to the preceding limitation, no loan for the construction of facilities shall be made unless the board finds that suitable existing facilities are not available for purchase or lease at a reasonable price or rent.

"(d) Loans for the construction or purchase of physical facilities, together with interest on the loans, shall be repaid upon an amortization plan over a period not in excess of twenty years."

There is no express authority given the Board to make loans for refinancing existing obligations of Cooperative Associations. The authority granted under section 7 (c) limits the power of the Board to the making of facility loans "for the construction or acquisition" of physical facilities. It follows from this limitation upon its power that the Board is without authority to make a loan the sole purpose of which is to refinance mortgages upon facilities already constructed and acquired by the borrower.

This view is confirmed by the legislative history of the Act. When the Bill was before the Senate, Senator Capper offered the following amendment (Cong. Rec. Vol. 71, Pt. 2, p. 1263):

"The board may make loans to cooperative associations for the purpose of paying off existing obligations or in-

debtedness upon existing physical marketing facilities, including equipment, land, buildings, and other property. Such loans shall be secured in such manner as in the judgment of the board is adequate."

Senator McNary, Chairman of the Committee on Agriculture and Forestry, and in charge of the Bill, expressed the following views during the debate on the amendment (*id.*, p. 1264):

"To permit the Government's money to be expended to refinance organizations that now owe country banks and the city banks debts at rates of interest far in excess of the rate which would be obtainable under this bill certainly would be a violation of the spirit of this proposed legislation. It would cost hundreds of millions of dollars; it would cost more than that. I made an estimate that it would absorb every dollar provided in this bill."

The amendment was rejected. (*Id.* 1264.)

I am therefore of the opinion that the Board is without authority to make loans for the sole purpose of refinancing mortgages on existing facilities.

V

The next question submitted is as follows:

"Are naval stores an agricultural product within the meaning of the Capper-Volstead Act, and does Federal Farm Board have authority to deal with an organized group of producers of naval stores, assuming that such group is otherwise qualified in form and substance to be termed a cooperative?"

"This controversy has been up for many years. Naval stores are defined by the Naval Stores Act. The industry is a well known and established one, and no statement of surrounding facts is required in order to properly raise the question. The Congress has several times within the past few years declined to amend the Capper-Volstead Act by specifically including naval stores in so many words in the statute."

"Naval stores" are defined in the Naval Stores Act (Act of March 3, 1923, 42 Stat. 1435) as follows:

"Sec. 2. When used in this Act—

"(a) 'Naval stores' means spirits of turpentine and rosin.

"(b) 'Spirits of turpentine' includes gum spirits of turpentine and wood turpentine.

"(c) 'Gum spirits of turpentine' means spirits of turpentine made from gum (oleoresin) from a living tree.

"(d) 'Wood turpentine' includes steam distilled wood turpentine and destructively distilled wood turpentine.

"(e) 'Steam distilled wood turpentine' means wood turpentine distilled with steam from oleoresin within or extracted from the wood.

"(f) 'Destructively distilled wood turpentine' means wood turpentine obtained in the destructive distillation of the wood.

"(g) 'Rosin' includes gum rosin and wood rosin.

"(h) 'Gum rosin' means rosin remaining after the distillation of gum spirits of turpentine.

"(i) 'Wood rosin' means rosin remaining after the distillation of steam distilled wood turpentine."

The Capper-Volstead Act, to which the Agricultural Marketing Act refers for its definition of the "cooperative associations," limits the permitted association to persons engaged in the production of "agricultural products" as "farmers, planters, ranchmen, dairymen, nut or fruit growers." None of these categories, in the common and ordinary meaning of the terms used, would seem to include producers of spirits of turpentine and rosin. The authority of the Board to make loans is further limited by section 7 (b) of the Agricultural Marketing Act to those "in furtherance of the policy declared in section 1," which, so far as here pertinent, is to promote the marketing of "agricultural commodities and their food products." The authority conferred by the second sentence of section 15 (a) of that Act is also confined to loans to producers of "any agricultural commodity."

The Agricultural Marketing Act contains no express definition of the term "agricultural commodities." Webster defines "agriculture" as "the science that treats of the cultivation of the soil"; also, "the cultivation of the soil for food products, or any other useful or valuable growths of the field or garden." A broader definition, but one excluding

naval stores, appears in section 1 of the Cooperative Marketing Act (Act of July 2, 1926, 44 Stat. 802), as follows:

"When used in this Act, the term 'agricultural products' means agricultural, horticultural, viticultural, and dairy products, livestock and the products thereof, the products of poultry and bee raising, the edible products of forestry, and any and all products raised or produced on farms and processed or manufactured products thereof, transported or intended to be transported in interstate and/or foreign commerce."

The expression "edible products of forestry" manifestly excludes turpentine and rosin. As the Act passed the House it included "naval stores" in the definition of agricultural products. The words "naval stores" were stricken from the definition by the Senate after extended debate, and in this amendment the House later concurred. (Cong. Rec. Vol. 67, pp. 11448-11454, 11616-11620, 12454.)

The definition of "agricultural products" thus enacted in a statute *in pari materia* with, and antedating by only three years, the Agricultural Marketing Act is strong evidence of the intention of Congress with respect to the meaning of the term "agricultural commodities" in the latter. Furthermore, the definition of naval stores in the Naval Stores Act includes not only the natural products of living trees, but also "steam distilled" and "destructively distilled" wood turpentine and wood rosin, which are industrial products and could by no proper interpretation be included in the expression "agricultural commodities."

I am of the opinion, therefore, that the answer to this question must be in the negative.

Respectfully,

WILLIAM D. MITCHELL.

To the PRESIDENT.

ESTABLISHMENT OF BRANCH BANKS BY NATIONAL BANKING ASSOCIATION

The Comptroller of the Currency is without authority to grant an application of a national banking association to establish a branch within a city in the State of Pennsylvania having in excess of 25,000 population, as the laws of Pennsylvania do not permit the

establishment of branches by State banks, and as by subsection (c) of section 7 of the Act of February 25, 1927 (44 Stat. 1228), national banking associations are permitted to establish and operate branches only, "if such establishment and operation are at the time permitted to State banks by the law of the State in question."

The application of the national banking association of Georgia to establish a branch within a city having a population of less than 80,000 must be denied, since the laws of Georgia do not permit the establishment of branches by State banks in cities having a population of less than 80,000, and as by subsection (c) of section 7 of the Act of February 25, 1927, *supra*, national banking associations are permitted to establish branches only where "State banks by the law of the State in question" are permitted to establish branches.

DEPARTMENT OF JUSTICE,

August 13, 1930.

SIR: I have the honor to acknowledge receipt of your letter of July 17, 1930, stating that the Comptroller of the Currency has pending before him the following applications for permission to establish branches by national banking associations:

"(1) An application for the consolidation of a State and national bank under charter of the national bank, in accordance with the provisions of section 3 of the Act of February 25, 1927, and in connection with such consolidation an application for the operation of a branch in the main office of the State bank as a branch of the consolidated bank. The town in which the two banks are located has in excess of 25,000 population according to the last decennial census and the State is the State of Pennsylvania;

"(2) An application from a national bank located in the State of Georgia in a city with more than 50,000 population for the establishment of a branch of a national bank in such city."

My opinion is requested regarding the Comptroller's authority to grant the applications for the establishment of the branches above indicated.

The law permitting the establishment of branch banks by national banking associations, under certain conditions, is contained in the Act approved February 25, 1927, c. 191, sec. 7, 44 Stat. 1224, 1228, which amends section 5155 of the Revised Statutes of the United States to read as follows:

"SEC. 5155. The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

"(a) A national banking association may retain and operate such branch or branches as it may have in lawful operation at the date of the approval of this Act, and any national banking association which has continuously maintained and operated not more than one branch for a period of more than twenty-five years immediately preceding the approval of this Act may continue to maintain and operate such branch.

"(b) If a State bank is hereafter converted into or consolidated with a national banking association, or if two or more national banking associations are consolidated, such converted or consolidated association may, with respect to any of such banks, retain and operate any of their branches which may have been in lawful operation by any bank at the date of the approval of the Act.

"(c) A national banking association may, after the date of the approval of this Act, establish and operate new branches within the limits of the city, town, or village in which said association is situated if such establishment and operation are at the time permitted to State banks by the law of the State in question.

"(d) No branch shall be established after the date of the approval of this Act within the limits of any city, town, or village of which the population by the last decennial census was less than twenty-five thousand. No more than one such branch may be thus established where the population so determined, of such municipal unit does not exceed fifty thousand; and not more than two such branches where the population does not exceed one hundred thousand. In any such municipal unit where the population exceeds one hundred thousand the determination of the number of branches shall be within the discretion of the Comptroller of the Currency.

"(e) No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

"(f) The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch

agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

“(g) This section shall not be construed to amend or repeal section 25 of the Federal Reserve Act, as amended, authorizing the establishment by national banking associations of branches in foreign countries, or dependencies, or insular possessions of the United States.

“(h) The words ‘State bank,’ ‘State banks,’ ‘bank,’ or ‘banks,’ as used in this section shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.”

One of the conditions precedent to the establishment of a branch bank by a national banking association is contained in subsection (c), namely, “if such establishment and operation are at the time permitted to State banks by the law of the State in question.” We must, therefore, look to the laws of the State in which the proposed branch is to be located to ascertain whether such laws permit the establishment of branches by State banks.

Giving consideration to the first case submitted, that of the establishment of a branch bank in the State of Pennsylvania, I find the Act of the General Assembly of Pennsylvania, approved April 27, 1927 (Laws of Pennsylvania 1927, p. 400), prohibits the establishment of branch banks in that State with certain exceptions. The Act reads in part as follows:

That no bank, banking company, banking institution, savings bank, trust company, title insurance company, or other corporation now or hereafter authorized to receive deposits or to carry on a banking or trust business, whether incorporated under the laws of Pennsylvania or of any other State or of the United States of America, and no individual, partnership, or unincorporated association carrying on a banking business, shall establish, maintain, or operate, either directly or indirectly, any branch bank, branch office, agency, suboffice, subagency, or branch place of business, within the Commonwealth of Pennsylvania, for the transaction of any part of its, his, or their business, but all of the business of such corporations, individuals, partnerships, and unincorporated associations shall be carried on solely and exclusively at its, his, or their principal place of business.

This act shall not apply to branches, suboffices, and subagencies established, or for which locations had been purchased or leased by deed recorded or leases actually delivered prior to March first, one thousand and nine hundred and twenty-seven; or to branches, suboffices, and subagencies which resulted from consolidations effective prior to April first, one thousand nine hundred and twenty-seven, by banks, banking companies, banking institutions, savings banks, trust companies, title insurance companies, or other corporations authorized to receive deposits, or carry on a banking or trust business, whether incorporated under the laws of Pennsylvania or of any other State or of the United States of America, * * *.

This Act shall not apply to any bank, banking company, banking institution, savings bank, trust company, title insurance company, or other corporation, now or hereafter authorized to receive deposits or carry on a banking or trust business, whether incorporated under the laws of Pennsylvania or of any other State or of the United States of America, or to any individual, partnership, or unincorporated association carrying on a banking business, which has its, his, or their principal place of business in a city, borough, or township within the Commonwealth of Pennsylvania, in which one or more national banking associations, incorporated under the laws of the United States of America, was, on March first, one thousand nine hundred and twenty-seven operating one or more branch banks, branch offices, agencies, suboffices, subagencies, or branch places of business, for the transaction of any part of its business; and any such corporations, individuals, partnerships, and unincorporated associations may hereafter establish, subject to the approval of the Secretary of Banking, and thereafter maintain and operate branch banks, branch offices, agencies, suboffices, subagencies, and branch places of business for the transaction of any part of its, his, or their business, but only within the corporate limits of the city, borough, or township in which its principal office is located and in which such national banking association was, on March first, one thousand nine hundred and twenty-seven, operating one or more branch banks, branch offices, agencies, suboffices, subagencies, or branch places of business. * * *.

The exception referred to is that in any city in the State of Pennsylvania where, on March 1, 1927, a national banking association was operating a branch, a State bank or other banking association may be permitted to establish and operate a branch. This exception is for the purpose of putting State banks on a parity with national banking associations in those cities where national banking associations have acquired and are operating branches.

In your letter you state that on March 1, 1927, national banking associations were operating branches in the following cities in Pennsylvania: Altoona, Chester, Johnstown,

Philadelphia, Reading, McKees Rocks. It is also stated that the city in which it is proposed to establish a branch is not one of the above-named cities.

With the above noted exception, the Act of the General Assembly of Pennsylvania, approved April 27, 1927, specifically forbids branch banking within that State. The condition contained in subsection (c) of section 7 of the Act of February 25, 1927, *supra*, applies to the case submitted and, accordingly, the establishment of the proposed branch bank in the State of Pennsylvania is unauthorized.

The contention is put forward that two State banks may merge under the general law of the State authorizing consolidation, enacted May 3, 1909 (P. L. 1909, p. 408), and that the merged corporation, by virtue of the general provisions of this statute which vest in it "all the property, rights, franchises, and privileges" of the constituent companies may thereafter, and notwithstanding the prohibition against branch banking contained in the later Act of April 27, 1927 (P. L. 1927, p. 400), continue the offices formerly occupied by each of the constituent companies. This construction of the State statutes is at best extremely doubtful. It is supported by the opinion of a Deputy Attorney General of the State of Pennsylvania, enclosed in your letter, but no judicial authority is cited. The argument proceeding upon the premise that consolidated State banks may, pursuant to this opinion, continue the offices of their constituent merged corporations as separate branches, concludes that national banking associations with which State banks have been consolidated may do likewise under the provisions of Revised Statutes 5155 (c), as amended by Act of February 25, 1927, c. 191 (44 Stat. 1224, 1228). While the premise is doubtful, the conclusion is clearly unsound because the latter section has reference, not to special privileges extended to consolidated banks but to permission to establish and operate branches extended generally to State banks, whether consolidated with other State banks or not. Furthermore, Revised Statutes 5155 (b), as amended, defines the conditions upon which branches may be retained and operated by national banking associations after their consolidations with State banks, and it is upon this section that the right of a consolidated national banking association to continue in oper-

ation the offices of its constituent corporations as branches of its business must depend. The section reads as follows:

SEC. 5155. * * * (b) If a State bank is hereafter converted into or consolidated with a national banking association, or if two or more national banking associations are consolidated, such converted or consolidated association may, with respect to any of such banks, retain and operate any of their branches which may have been in lawful operation by any bank at the date of the approval of the Act.

There is nothing in this language which authorizes the retention and operation of the principal office of the constituent State bank as a branch of the consolidated national banking association, and I am advised by the Comptroller of the Currency that it has not been the practice of his office to permit this to be done. Nor can the limitations of the statute be evaded by calling the former offices of the national banking association and the State bank with which it is merged two principal offices. After consolidation one of the two must be the "main" or principal office and the other a branch bank or branch office of the consolidated association. In this connection attention is invited to subsection (f) of section 7 of the Act of February 25, 1927, *supra*, which defines the term "branch." Under that definition any place of business maintained by a national banking association where deposits are received, or checks paid, or money lent, other than the main office of the bank, must be considered a branch thereof.

I am, therefore, of the opinion that the Comptroller is without authority to grant the first application referred to in your letter.

Your second question involves the application of a national banking association located in the State of Georgia, in a city of more than fifty thousand but less than eighty thousand population, to establish a branch in that city. Subsection (c) of section 7 of the Act of February 25, 1927, *supra*, applies to this application and unless the laws of the State of Georgia permit the establishment and operation of branches by State banks none can be established within that State by a national banking association.

Upon examining the laws of the State of Georgia I find that section 1 of the Act approved August 25, 1927, Laws of Georgia, 1927, p. 195, 197, contains the following provision:

"After this Act takes effect, no new or additional branch banks shall be established." However, by subsequent legislation, the General Assembly of the State of Georgia enacted two acts authorizing the establishment of branch banks in certain cities within that State. The first, approved July 20, 1929 (Sec. 2366 (3a) of the 1930 Supplement to the Georgia Code), provides:

Banks chartered under the laws of this State, and having their principal office in a city now or hereafter having a population of not less than eighty thousand or more than one hundred and twenty-five thousand, may establish branch banks in the city in which its principal office is located.

The Act of August 17, 1929 (See 2366 (3b) 1930 Supplement of the Georgia Code), provides:

Banks chartered under the laws of this State, and having their principal office in a municipality now or hereafter having a population of not less than 200,000 according to the last census of the United States, or any future census of the United States, may establish branch banks in the municipality in which its principal office is located.

The Attorney General for the State of Georgia, in an opinion dated November 26, 1929, a copy of which was enclosed with your letter, has held that there is no conflict between the two Acts last quoted, and that the latter does not repeal the earlier one. Whether it does or not, it is entirely clear that the laws of Georgia do not permit the establishment of branches by State banks in cities having a population of less than 80,000.

Since subsection (c) of section 7 of the Act of February 25, 1927, *supra*, permits the establishment by a national banking association of branches within the city or town in which the association is located only "if such establishment and operation are at the time permitted to State banks by the laws of the State in question," it follows that the application of the national banking association of Georgia to establish a branch within a city having a population of less than 80,000 must be denied.

Respectfully,

THOMAS D. THACHER,
Acting Attorney General.

To the SECRETARY OF THE TREASURY.

COASTWISE TRADE—FOREIGN VESSELS

Where passengers were transported by a Japanese vessel from San Francisco, Cal., to Honolulu, T. H., and thence by a British vessel to Sydney, Australia, the transportation of passengers by the Japanese vessel from San Francisco to Honolulu was in violation of section 8 of the Act of June 19, 1886 (24 Stat. 81), as amended by the Act of February 17, 1898 (30 Stat. 248).

DEPARTMENT OF JUSTICE,

August 13, 1930.

SIR: I have your letter of June 6, 1930, which requests my opinion as to whether the transportation of two passengers from San Francisco to Honolulu by the Japanese Steamship *Asama Maru* was in violation of section 8 of the Act of June 19, 1886, c. 421, 24 Stat. 79, 81, as amended by the Act of February 17, 1898, c. 26, 30 Stat. 248 (U. S. C. Title 46, section 289). The facts are these:

The Canadian-Australasian Royal Mail Line maintains passenger service between Canadian-Pacific ports and Sydney, Australia, with their vessels regularly stopping at Honolulu as a port of call. The Nippon Yusen Kaisha Steamship Line maintains passenger steamship service between United States Pacific ports and the Far East ports, not including Australian ports, with Honolulu as a port of call. Two passengers were transported on the Steamship *Asama Maru*, of the Japanese Line, from San Francisco, California, and landed at Honolulu, with that vessel then continuing on her regular voyage from Honolulu to the Far East ports, not including Australian ports. Eight days later the passengers embarked on the British Steamship *Niagara*, of the Canadian-Australasian Line, from Honolulu for Sydney, Australia. It is understood that the passengers bought from the Japanese Line through tickets from San Francisco to Sydney, calling for transportation aboard the Japanese vessel from San Francisco to Honolulu and on a vessel of the Canadian-Australasian Line from Honolulu to Sydney, Australia. Exactly what this arrangement between the two Lines was is not stated, nor has the ticket issued covering the transportation been submitted.

The amended section reads as follows:

"No foreign vessel shall transport passengers between ports or places in the United States, either directly or by way of a foreign port, under a penalty of two hundred dollars for each passenger so transported and landed."

The Act of April 30, 1900, c. 339, sections 5 and 98, 31 Stat. 141, 161 (U. S. C. Title 48, sections 495 and 509) extended to the Territory of Hawaii all laws of the United States not locally inapplicable, including those regulating the coasting trade. The Merchant Marine Act 1920, c. 250, section 22, 41 Stat. 988, 997 (repealing the Act of October 6, 1917, c. 88, 40 Stat. 392, which had authorized the Shipping Board in its discretion to suspend the laws and admit foreign ships to the coasting trade during the war and for one hundred and twenty days thereafter), provided that "the Board is authorized to issue permits for the carrying of passengers in foreign ships if it deems it necessary so to do, operating between the Territory of Hawaii and the Pacific Coast up to February 1, 1922." Honolulu, therefore, is a port or place in the United States within the meaning of the above-quoted provision. *Huus v. New York, etc. Steamship Co.*, 182 U. S. 392; 30 Op. 44.

Under the arrangements for transportation made between the Steamship Line and the passengers, it was understood that the *Asama Maru* would transport them from San Francisco to Honolulu and that this was the only service which that vessel could perform. The Japanese Line did not employ the *Asama Maru* or any of its vessels in passenger service between Honolulu and Sydney, Australia, which was the remaining leg of the voyage which the passengers had arranged. The *Asama Maru* was engaged only in transporting the passengers from the time when the vessel sailed from San Francisco until the vessel arrived and the passengers were landed at Honolulu. That was the service to the passengers which it was understood the vessel was to render, and because of the vessel's employment was the only service she could render to these passengers. The transportation service contracted to be performed by the Canadian-Australasian Line began when the passengers later embarked on its vessel

at Honolulu. That Line maintained no passenger service for its vessels between San Francisco and Honolulu.

The inhibition of the statute is against a foreign vessel transporting passengers between two ports of the United States. Its purpose is to restrict the carriage of passengers between domestic ports to vessels of the United States. This is the interpretation placed upon the statute by Acting Attorney General Jenks (18 Op. 445, 446) :

“By the provision of this act the fine is imposed upon the vessel for the wrong-doing of the vessel, and not for any act done by the passengers; hence the inquiry is one between the United States and the vessel. The customhouse officers are not burdened with the difficult task of inquiring what each passenger did, whether he paid for his ticket, or the terms on which he was transported by the vessel, or any other act or doing of a passenger, except as a means of determining where the passenger was taken on board or landed. * * * The fact that each of the passengers paid his fare in two separate payments, and had his trunks examined by the customhouse officers, should not be allowed to change the result following from the continuity of the voyage; for it must be borne in mind that it is the vessel that is subjected to the fine, and not the passengers. The claim for the fine is by the United States against the vessel. * * * A different construction of the law would render the act practically inoperative and the intent of the lawmakers ineffectual. Hence the conclusion follows that the decisive facts in this and similar cases are: Was the vessel a foreign one? Did she take the passengers on board at a port of the United States and after a substantially continuous voyage land them at another port of the United States? When this conjunction of facts exists, the vessel is subjected to liability for the fine; and, as these facts are all found to exist in the case submitted, the vessel is subject to the penalties provided by the act.”

The plain wording of the statute prohibited the transportation here involved and subjected the vessel to the penalty and I so advise you.

Respectfully,

THOMAS D. THACHER,
Acting Attorney General.

To the SECRETARY OF COMMERCE.

**ISSUANCE OF LICENSE FOR WATER POWER DEVELOPMENT
ON NEW RIVER, VA.**

The Federal Power Commission may, in its discretion, issue to the Appalachian Electric Power Company a minor-part license under section 10 (1) of the Federal Water Power Act (41 Stat. 1070), for the construction and operation of a projected water-power development on New River, a nonnavigable tributary of the Kanawha River, a navigable stream.

The Commission is not required to insert in a lease issued for this project any conditions, except the fifty-year limitation upon the terms of the lease, which, in its judgment, are not necessary or appropriate to fully utilize the waters of the New River in the protection or development of navigation of the Kanawha River.

DEPARTMENT OF JUSTICE,

September 22, 1930.

SIR: In response to your letter of July 31, 1930, requesting my opinion on certain questions regarding the issuance of a license under section 23 of the Federal Water Power Act (41 Stat. 1075; U. S. C. A., Title 16, c. 12, sec. 817) contained in a letter addressed to me by Hon. Patrick J. Hurley, Secretary of War, as Acting Chairman of the Federal Power Commission, under date of July 21, 1930, I have the honor to advise you as follows:

The questions submitted arise in connection with the application of the Appalachian Electric Power Company for a license for a projected water power development on New River, a nonnavigable stream. The Power Company has requested the Commission to issue a license containing only such conditions as the Commission shall deem reasonable and appropriate for the protection of navigation on the Kanawha River, a navigable stream to which the New River is tributary, and has declined to accept a license tendered by the Commission containing all of the conditions, provisions and requirements specified in the Federal Water Power Act of June 10, 1920, 41 Stat. 1063, c. 285. This request and declination of the Appalachian Electric Power Company are contained in its letter of March 1, 1928, directed to the members of the Commission and published in the Eighth Annual Report of the Federal Power Commission, at pages 143 to 147.

The questions submitted are as follows:

"1. The applicant having agreed to accept the conditions relating to the release of water from the project, may the Commission deny a license and thereby deny to the applicant the use of his property, until he accepts the application to his project on a nonnavigable stream of *all* the provisions of the Act?

"2. Is the Commission authorized or required, by section 23 or any other section of the Federal Water Power Act, to write into the license for this project on private property and on a nonnavigable tributary of a navigable waterway, any provisions other than those necessary to insure such release of water therefrom as will maintain unimpaired the navigable capacity of the navigable waterway below, viz., the Kanawha River, or, otherwise stated, may all conditions imposed on licenses (sic) on navigable streams, including the recapture clause, be inferred (sic) under the facts in this case?"

The facts of the case as recited in the Commission's letter of July 21, 1930, are as follows:

The Kanawha River is a navigable stream entirely within the State of West Virginia. It is formed by the junction of the New and the Gauley Rivers, a short distance above Kanawha Falls, flows thence about 97 miles in a generally northwesterly direction, and empties into the Ohio River at Point Pleasant, West Virginia. It is navigable for 90 miles above its mouth, a 6-foot navigable depth being maintained by means of eight locks with movable dams and two locks with fixed dams. New River, upon which the proposed development of the Appalachian Electric Power Company is located, is neither navigated nor navigable in fact. On June 26, 1925, the New River Development Company submitted to the Federal Power Commission a declaration of intention covering the project in question, to be located near Radford, in Pulaski County, Virginia, about 155 miles above the head of navigation on the Kanawha River. The United States owns no lands or other property in the vicinity of the project. None of the proposed works is in navigable waters and none can in itself offer physical obstruction to navigation. Only by the operation of the works in im-

pounding and releasing water, and thus creating an uneven stream flow, can any effect upon the navigability of the Kanawha River be produced. Under the date of September 2, 1926, Appalachian Electric Power Company, as successor in interest to New River Development Company, submitted its application for license under section 23 of the Federal Water Power Act. The Commission thereafter, on June 1, 1927, made the following decision with respect to this application:

"The Commission having caused investigation of such proposed construction to be made and it appearing from such investigation and from reports submitted thereon that said project, unless operated in the interests of interstate or foreign commerce in accordance with the requirements of said Act, would have an adverse effect on such interests, but if operated in accordance with such requirements would materially benefit such commerce, thereupon found that said river and the part thereof involved in said declaration is not "navigable waters" within the definition thereof in said Act, but that the interests of interstate or foreign commerce would be affected by such proposed construction. (Seventh Annual Report of the Federal Power Commission, 1927, pp. 113-114.) "

In my opinion of July 1, 1930, with reference to an application for license for a power project on the Cumberland River in Kentucky, I had occasion to advise you in regard to the application of section 23 of the Federal Water Power Act to a project for the development of water power on the upper nonnavigable part of a stream which in its lower reaches was a highway of interstate commerce, and concluded that the Commission had jurisdiction in that case to entertain the application of the Cumberland Hydroelectric Power Company for a license to carry on its project on the Cumberland River. Similarly in this case I am constrained to conclude that in view of the findings of the Commission above quoted the Commission has power to entertain the application of the Appalachian Electric Power Company, and to issue a license for this project under the provisions of section 23 of the Act. The Commission having found that the interests of interstate and foreign commerce would

be affected by the proposed construction, the Appalachian Electric Power Company is prohibited by the terms of section 23 of the Federal Water Power Act from proceeding with the construction of its project "until it shall have applied for and shall have received a license under the provisions of this Act."

Section 10 of the Act provides that all licenses issued under the Act, except minor-part licenses authorized under paragraph (i) of section 10, shall be on certain specified conditions, and such other conditions not inconsistent with the provisions of the Act as the Commission may require. Many of the conditions specified in section 10 appear to have no effect in preventing impairment of or in developing the navigable capacity of the Kanawha River, which can only be affected by the manner in which the flow of the stream is controlled in connection with the operation of the projected water power. It is to such conditions that the applicant for a license objects. The only authority granted to the Commission to dispense with these conditions specified in section 10 is found in subdivision (i) of section 10, which reads as follows:

"(i) In issuing licenses for a minor part only of a complete project, or for a complete project of not more than one hundred horsepower capacity, the commission may in its discretion waive such conditions, provisions, and requirements of this Act, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: *Provided*, That the provisions hereof shall not apply to lands within Indian Reservations." (41 Stat. 1070.)

The question is therefore presented whether the Commission may in this case issue a minor-part license with such conditions as it shall deem necessary in the public interest.

The legislative history of this provision throws but little light upon its precise meaning. The genesis of the clause is found in a Conference Committee Report on a bill pending in the 65th Congress which failed of passage. (House Report No. 1147, 65th Congress, 3rd session; Congressional Record, Vol. 57, p. 4635.) This report shows that the Conference Committee added to section 10, paragraph (h), which reads as follows:

"(h) That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited. In issuing licenses for a part only of a complete project, where the land of the United States required is to be used only for transmission lines, water conduits, or for storage reservoirs, or for a complete project of not more than fifty horse-power capacity, the commission may in its discretion waive such conditions, provisions, and requirements of this Act as it may deem equitable in the circumstances."

The only comment upon this amendment found in the reports is a statement by the managers on the part of the House: "It is thought by your conferees that such discretion should be vested in the Commission."

During the first session of the 66th Congress, H. R. 3184 was introduced containing section 10(h), as above quoted, from the bill which failed of passage in the previous Congress. Thereafter the Committee on Commerce of the Senate proposed an amendment to the bill by deleting the second sentence of paragraph (h), above quoted, and adding paragraph (i) in the following form:

"(i) In issuing licenses for a minor part only of a complete project, or for a complete project of not more than two hundred horsepower capacity, the commission may in its discretion waive such conditions, provisions, and requirements of this act, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances. (66th Congress, 1st session; Senate Report No. 180, p. 15.) "

There was no statement in this report regarding the purpose of the Committee in proposing this amendment.

The bill passed the Senate, with a proviso added to this clause reading: "*Provided*, That the provisions hereof shall not apply to lands within Indian Reservations," and was then referred to a Conference Committee of both Houses. In conference, section 10(i) was amended to read in its present form. A statement by the managers on the part

of the House appearing in the 59th Congressional Record, part 6, p. 6384, with reference to this clause, reads as follows:

"On amendments Nos. 42 and 43: These amendments strike from the House bill the provision authorizing the Commission in its discretion to waive certain conditions, provisions, and requirements of the Act in issuing licenses for a part only of a complete project, where the land of the United States required is to be used only for transmission lines, water conduits, or for storage reservoirs, or for a complete project of not more than 50-horsepower capacity. In lieu of the House provisions the Senate excepted from such waiver the license period of 50 years and increased the horsepower capacity to 200 horsepower. The House conferees agreed to the Senate substitute with an amendment reducing the horsepower capacity to 100. Under the House provision the Commission could allow perpetual grants without conditions for transmission lines, water conduits, and storage reservoirs if the remainder of the project was on private land."

The bill containing section 10(i), as thus agreed upon by the conferees, passed both Houses without debate on this paragraph.

The intent to broaden the application of the clause and thus to bring within the discretion of the Commission the provisions of any license for a minor part of a complete project is entirely clear but precisely what was meant by the clause "In issuing licenses for a minor part only of a complete project" is left obscure, and this clause requires interpretation in the light of the powers which Congress intended to exercise, and the purposes which it intended to accomplish.

Upon the facts stated by the Commission in this case the United States has no power to prevent the construction of the proposed project on the New River unless its operation will tend to impair the navigability of the Kanawha River by changing the normal and regular flow of the stream; and the only interest which the United States has to protect, and for which it may be justified in issuing a license, is a very minor part of the complete project, viz., the manner in which the flow of the stream below the dam

is affected by the operation of the water power. I am advised by a representative of the Commission that under a license providing merely for proper control of the retention and release of water, this project will tend to improve the navigability of the Kanawha River. Under these circumstances every purpose within the power of Congress may be accomplished by the issuance of a minor part license under paragraph (i) of section 10. Accordingly I am of the opinion that the most reasonable construction of this statute is that paragraph (i) of section 10 was intended to have application in such a case provided the interests of the United States may be fully protected by the issuance of a license to control the flow of the stream and/or to use physical instrumentalities which may be constructed for this purpose, the conditions of such license to be fixed by the Commission in its discretion under section 10(i) of the Act.

This interpretation appears necessary in order to avoid serious questions regarding the constitutionality of the Act which might be presented if section 10(i) should be interpreted so as to have no application to projects constructed in or on nonnavigable streams, which only remotely and indirectly affect the navigability of waters in the lower reaches of streams to which they are tributaries. If paragraph (i) of section 10 is not applicable in such cases the Commission would in no such case be authorized to waive any of the conditions specified in section 10, because section 23 prohibits any such construction, once the Commission finds that the interests of interstate or foreign commerce will be affected, until a license is issued under the provisions of the Act. To hold that the Commission has full authority under this section to exercise its discretion in granting a minor-part license in this case leads to a reasonable construction of the statute and a full accomplishment of its legislative purpose.

This interpretation of paragraph (i) of section 10 finds some support in the administrative construction of the Act adopted by the Commission on May 23, 1925, in its consideration of several applications (Project No. 15) of Hydraulic Race Company and other corporations, reported in the Fifth Annual Report of the Federal Power Commission, 1925, at pp. 111 and 112.

In answering the questions proposed by the Commission, I have accordingly to advise you that it is my opinion that the Commission may, in its discretion, issue a minor-part license under paragraph (i) of section 10, for the construction and operation of the project here in question; that it is not required to insert in a license issued for this project, any conditions (except the fifty-year limitation upon the terms of the license) which, in its judgment, are not necessary or appropriate to fully utilize the waters of the New River in the protection or development of navigation of the Kanawha River.

Respectfully,

WILLIAM D. MITCHELL.

To the PRESIDENT.

CENSUS DATA UNAVAILABLE TO WOMEN'S BUREAU OF
DEPARTMENT OF LABOR AND INDIVIDUALS

It is the duty of the Director of the Census to decline to furnish the Women's Bureau of the Department of Labor with the names, addresses, occupations, and status of employment of workers in the city of Rochester, N. Y., for use in connection with a contemplated survey to ascertain the economic effects upon family and community life of the employment of women in industry; and it is likewise his duty to decline to furnish various individuals and associations interested in public education and the eradication of illiteracy with the names and addresses of persons unable to read and write.

DEPARTMENT OF JUSTICE,
September 29, 1930.

SIR: I have the honor to comply with your request of August 18, 1930, for my opinion upon the authority of the Director of the Bureau of the Census (1) to furnish the Women's Bureau of the Department of Labor with the names, addresses, occupations, and status of employment of workers in the city of Rochester, N. Y., for use in connection with a contemplated survey to ascertain the economic effects upon family and community life of the employment of women in industry, and (2) to furnish various individuals and associations interested in public education and the eradication of illiteracy with the names and addresses of persons in given sections and communities who are unable to read

and write—all such information in your possession having been gathered for the fifteenth decennial census.

The Act of June 18, 1929 (Public No. 13, 71st Cong.), providing for the census, made it the duty of all persons over eighteen years of age to answer correctly, to the best of their knowledge, all authorized questions under penalty of fine and imprisonment, and further provided:

“SEC. 11. That the information furnished under the provisions of this Act shall be used only for the statistical purposes for which it is supplied. No publication shall be made by the Census Office whereby the data furnished by any particular establishment or individual can be identified, nor shall the Director of the Census permit anyone other than the sworn employees of the Census Office to examine the individual reports.” (46 Stat. 25.)

“SEC. 18. That the Director of the Census be, and he is hereby, authorized at his discretion, upon the written request of the governor of any State or Territory or of a court of record, to furnish such governor or court of record with certified copies of so much of the population or agricultural returns as may be requested, upon the payment of the actual cost of making such copies and \$1 additional for certification; and that the Director of the Census is further authorized, in his discretion, to furnish to individuals such data from the population schedules as may be desired for geneological or other proper purposes, upon payment of the actual cost of searching the records and \$1 for supplying a certificate; and that the Director of the Census is authorized to furnish transcripts of tables and other records and to prepare special statistical compilations for State or local officials, private concerns, or individuals upon the payment of the actual cost of such work: *Provided, however,* That in no case shall information furnished under the authority of this Act be used to the detriment of the person or persons to whom such information relates. All moneys hereafter received by the Bureau of the Census in payment for labor and materials used in furnishing transcripts of census records or special statistical compilations from such records shall be deposited to the credit of the appropriation for collecting statistics.”

The source of each of these sections is to be found in earlier legislation.

The Act of March 3, 1899 (c. 419, sec. 30, 30 Stat. 1014, 1021), provided, "That upon the request of the governor of any State or Territory, or the chief officer of any municipal government, the Director of the Census shall furnish such governor or municipal officer with a copy of so much of the population returns as will show the names, with the age, sex, color, or race, and birthplace only of all persons enumerated within the territory in the jurisdiction of such government, * * *."

Section 32 of the Act of July 2, 1909 (c. 2, 36 Stat. 1, 10), authorized the Director, in his discretion, to furnish the governor of any State or Territory or a court of record with "certified copies of so much of the population or agricultural returns as may be requested." Section 25 thereof contained a new proviso:

"That the information furnished under the provisions of the next preceding section [relating to manufacturing establishments, mines, quarries or other establishments of productive industry] shall be used only for the statistical purposes for which it is supplied. No publication shall be made by the Census Office whereby the data furnished by any particular establishment can be identified, nor shall the Director of the Census permit anyone other than the sworn employees of the Census Office to examine the individual reports."

It was stated in behalf of the committee reporting the bill that the purpose was to secure "a more effective guaranty than heretofore of the confidential character of the returns as needed in many cases and desirable in all to enlist that public confidence without which census inquiries must fail." (House Rept. 960, 60th Cong. 1st Sess.)

Section 32 was carried into the Act of March 3, 1919 (c. 97, 40 Stat. 1291, 1301), with some changes and became section 33 of that Act, worded identically as is section 18 in the later Act (June 18, 1929) now under consideration. Section 25 became also section 25 of the 1919 Act without change except that its application was extended to embrace information furnished by "any company, business, institution, establishment, religious body, or organization of any nature

whatsoever," and has become section 11 of the present Act with these important changes: It now extends to "information furnished under the provisions of *this Act*"—not merely under a particular section—and to "data furnished by any particular establishment *or individual*."

The proviso, "that in no case shall information furnished under the authority of this Act be used to the detriment of the person or persons to whom such information relates," when first inserted in 1919 caused some apprehension in Congress that notwithstanding inhibitions elsewhere it might be understood to contemplate the giving out of non-statistical information furnished by industrial establishments, manufacturers, etc., but assurance was given in the Committee on the Census and on the floor of the House that the proviso was merely precautionary, that the Committee did not purpose nor did the Director intend to give out any such information. (Hearings, pp. 168 et seq., Cong. Rec., v. 56, pt. 9, pp. 8658-8659.)

I am informed by the Director that the apparent purpose in this respect has been rigidly carried out, to the extent, in fact, that even statistics for a given community are not published when, because of the limited number of industries therein, the possibility exists that interested parties by some computation might succeed in disclosing information respecting a particular establishment or establishments. Requests for the names of persons engaged in manufacturing, etc., have been denied, although one such request came from the governor of a State.

Such was the interpretation placed upon the language of section 25 of the 1919 Act, in accordance with the presumed intention of Congress, and now, in section 11 of the present Act, the inhibition without other change of language is extended to include all information furnished by individuals as well as those business establishments, etc., heretofore specially protected. The change must be accorded significance. Even prior thereto, I am informed, it was the practice of the Director to interpret the law most strictly against furnishing either official or private persons with information that would reveal to another the identity of the individuals to whom it relates, and many requests from officers

or departments of the Government have been denied in recent years.

After enactment of the statute the President, on November 22, 1929, proclaimed to the people that: "The sole purpose of the census is to secure general statistical information regarding the population and resources of the country, and replies are required from individuals only to permit the compilation of such general statistics. No person can be harmed in any way by furnishing the information required. The census has nothing to do with taxation, with military or jury service, with the compulsion of school attendance, with the regulation of immigration or with the enforcement of any national, state or local law or ordinance. There need be no fear that any disclosure will be made regarding any individual person or his affairs. For the due protection of the rights and interests of the persons furnishing information every employee of the Census Bureau is prohibited, under heavy penalty, from disclosing any information which may thus come to his knowledge."

An examination of the proceedings attending the passage through Congress of various Census Acts reveals that it has sometimes been suggested that a wider use be made, particularly by other departments of the Government, of information obtained in the census. On the other hand, it has been pointed out that a step in this direction might lead to a widespread reluctance upon the part of the public about giving information and thus add to the difficulties already encountered in obtaining full and correct responses—and this view appears to have prevailed. (Hearings, *supra*, p. 172; Cong. Rec., v. 56, pt. 9, pp. 8659; *id.*, v. 71, pt. 3, pp. 2359-2360.)

It is therefore my opinion that it is the duty of the Director of the Census to decline to furnish the Women's Bureau of the Department of Labor with the names, addresses, occupations, and status of employment of workers in the city of Rochester, N. Y., and that it is likewise his duty to decline to furnish the individuals and associations with the names and addresses of persons unable to read and write.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF COMMERCE.

PORTO RICO—VALIDITY OF BOND ISSUE

The proposed issue of bonds for the Government of Porto Rico in the sum of \$500,000, the proceeds from the sale of which are to be used in paying the obligations contracted by the Workmen's Relief Commission, etc., being authorized by Congress and by Joint Resolution No. 60 of the Legislature of Porto Rico of May 5, 1930, and all the statutory requirements concerning the issuance of these bonds having been complied with, said bonds will, when issued in the amount and form proposed and sold by the Secretary of War with the concurrent approval of the Governor and the Treasurer of Porto Rico, constitute valid and binding obligations of the People of Porto Rico.

DEPARTMENT OF JUSTICE,
November 10, 1930.

SIR: I have the honor to comply with your request of October 16, 1930, for my opinion concerning the validity of a proposed issue of bonds, for the Government of Porto Rico, of the face value of \$500,000, in the form and denomination and for the purposes hereinafter indicated.

Section 3 of the Act of Congress approved March 2, 1917, entitled "An Act to provide a civil Government for Porto Rico and for other purposes," as amended by the Act of March 4, 1927 (c. 145, 39 Stat. 951, 953; c. 503, 44 Stat. 1418; U. S. C. Title 48, sec. 741, 745), provides:

"* * * and when necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Porto Rico or any municipal government therein as may be provided by law, and to protect the public credit: *Provided, however,* That no public indebtedness of Porto Rico and the municipalities of San Juan and Ponce shall be allowed in excess of 10 per centum of the aggregate tax valuation of its property * * *. In computing the indebtedness of the people of Porto Rico, municipal bonds for the payment of interest and principal of which the good faith of the people of Porto Rico has heretofore been pledged and bonds issued by the people of Porto Rico secured by bonds to an equivalent amount of bonds of municipal corporations or school boards of Porto Rico shall not be counted, but all bonds hereafter issued by any municipality or subdivision * * * for which the good faith of the people of Porto Rico is pledged shall be counted."

The documents submitted with your letter show that the aggregate assessed valuation of real and personal property in Porto Rico on June 30, 1930, amounted to \$330,274,020; that on the same date there were outstanding bonds of the Government of Porto Rico of the face value of \$28,898,000, that since the amendatory Act of March 4, 1927, the good faith of the people of Porto Rico has been pledged to the payment of principal and interest on municipal bonds aggregating \$1,361,500, which must be added to the foregoing, making a total of \$30,259,500 to be considered when ascertaining the total bonded indebtedness which the Government of Porto Rico is authorized to incur. Therefore, it is apparent that the proposed issue will not increase the bonded indebtedness of the Government of Porto Rico beyond ten per centum of the aggregate assessed valuation, the maximum permitted by law.

The proposed issued is authorized by Joint Resolution No. 60 of the Legislature of Porto Rico, approved May 5, 1930 (Laws, 1930, p. 744, 750), which declares the existence of an emergency, was passed by a vote of two-thirds of all the members elected to each house of the Legislature, and therefore became effective immediately after its approval as directed by section 12 thereof, in accordance with section 34 of the Act of Congress of March 2, 1917, *supra* (U. S. C., Title 48, sec. 827). The Resolution provides generally for liquidation by the Industrial Commission of Porto Rico of the Workmen's Relief Trust Fund of the extinct Workmen's Relief Commission, including the collection of premiums due the said fund by employers; and section 6, authorizing the issuance of bonds, reads as follows:

"SECTION 6.—The Governor of Porto Rico, upon recommendation of the Industrial Commission, is hereby authorized to borrow money from the banks of Porto Rico or of continental United States, and to issue and sign negotiable promissory notes in the name of The People of Porto Rico, or to direct the Treasurer of Porto Rico to issue bonds of The People of Porto Rico, which shall also bear the signature of the Governor, up to the sum of five hundred thousand (500,000) dollars, and to pledge the good faith of The People of Porto Rico. In either case, the rate of interest

shall not exceed six per cent (6%) per annum payable semi-annually on January 1 and July 1 of each year. The amount so borrowed shall be payable partially in annual instalments of twenty-five thousand (25,000) dollars, with interest, until the total amount of the indebtedness has been wholly paid. The interest and the principal maturing each year shall be included in the general budget of expenses of The People of Porto Rico; *Provided*, That the Governor of Porto Rico may borrow said money and direct the issue of bonds in partial amounts and he is hereby authorized to prescribe the form, date and amount to be borrowed.

"The money so borrowed shall be covered by the Treasurer of Porto Rico into the Workmen's Relief Trust Fund of the extinct Workmen's Relief Commission, and the same shall be used in paying the obligations contracted by the Workmen's Relief Commission, in accordance with such provision as the Industrial Commission may make. * * *"

It has been judicially determined that the Act of February 25, 1918, creating the Workmen's Relief Commission, represented a valid exercise of power delegated by Congress to the Legislature of Porto Rico. *Camunas v. Porto Rico Ry., Light and Power Co.*, 272 Fed. 924, 928. Therefore, obligations incurred in accordance with that Act must be deemed proper public ones for the liquidation of which bonds may be issued.

The Governor, upon recommendation duly adopted by the Industrial Commission, has directed the Treasurer to issue bonds in the total amount of \$500,000, in twenty separate series of \$25,000 each, to be dated July 1, 1930, and to mature respectively on July 1st of each year, 1931 to 1950, inclusive, to be in coupon form of the denomination of \$1,000 each, to bear interest at the rate of 4½ per centum per annum, payable semiannually on January 1 and July 1 of each year, both principal and interest to be payable at the office of the Treasurer of the United States in lawful money of the United States; and you have been requested to arrange for sale of the bonds as near the date of issue as possible, the sale to be made on public call for bids and award to be made to the best bidder.

I have examined the proposed form of bond submitted with your letter and find that it accords with the directions of the Legislature and the determinations of the Governor. It properly recites that "under the provisions of section 3 of the Act of Congress, approved March 2, 1917, as amended by the Act of March 4, 1927, this bond is exempt from taxation by the Government of the United States, or by the Government of Porto Rico or of any political or municipal subdivision thereof, or by any State, Territory, or possession, or by any county, municipality, or other municipal subdivision of any State, Territory, or possession of the United States, or by the District of Columbia."

I must advise, however, that when the bonds are offered for sale no bid should be rejected or award made without the approval of the Governor and the Treasurer of Porto Rico. Possibly it was contemplated by the Legislature that the bonds would be sold by the Secretary of War, as had been done under prior statutes which expressly conferred the authority, but the Act here involved expressly confers authority in connection with the issuance of these bonds only upon the Governor and the Treasurer. A public officer so authorized to issue bonds may not delegate any part of his authority, although he may designate another to perform in his behalf acts not involving the exercise of discretion. *Blair v. City of Waco*, 75 Fed. 800, 802; *Brown v. Newburyport*, 209 Mass. 259, 268; *Jones v. Veltmann*, 171 S. W. 287, 289; *Theis v. Board of County Commissioners of Beaver County*, 22 Okla. 333, 342, 344.

It is my opinion that all the statutory requirements concerning the issuance of the bonds have been complied with and that they will, when issued in the amount and form proposed and sold by the Secretary of War with the concurrent approval of the Governor and the Treasurer of Porto Rico, constitute valid and binding obligations of the People of Porto Rico.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF WAR.

ASSIGNMENT OF RUNNING MATE TO COMMANDER CHARLES
E. PARSONS, SUPPLY CORPS, U. S. NAVY

Commander Charles E. Parsons, Supply Corps, U. S. Navy, who as lieutenant commander was assigned a line running mate of the rank of commander under the Act of June 10, 1926 (44 Stat. 717), is entitled, after his advancement to commander, to retain the running mate previously assigned to him; the Act, *supra*, did not require or authorize the assignment to Commander Parsons of a new running mate.

DEPARTMENT OF JUSTICE,

December 5, 1930.

SIR: I have the honor to refer to your letter of June 2, 1930, requesting my opinion whether Commander Charles E. Parsons, Supply Corps, U. S. Navy, has been assigned the correct line running mate under the Act of June 10, 1926, c. 529, 44 Stat. 717 (U. S. C. Title 34, Supp. III, sections 348-348t), since his promotion to the rank of commander on February 14, 1928.

The running mate assigned him by the Navy Department is of the rank of commander. A bill (H. R. 4940) directing that he be assigned a new running mate of the rank of captain has been favorably reported by the House Committee on Naval Affairs (H. Rept. 2017, 71st Cong. 2nd Sess.) and, if enacted, would make the question moot. Another pending bill (H. R. 11004) would direct like action for two other Supply Corps officers. Meanwhile, the Chairman of the Committee has urged you to reconsider the action taken in Commander Parsons' case and has reported to Congress (H. Rept. 2017) the Committee's view that it does not accord with the law. I understand that you have undertaken such reconsideration and desire my opinion in connection therewith.

The Act of June 10, 1926, is entitled, "An Act to provide for the equalization of promotion of officers of the staff corps of the Navy with officers of the line." Advancement in some branches of the service had been more rapid than in others. With respect to officers commissioned as ensigns on the same day some years earlier, one perhaps would have attained the rank of commander in the line, another lieutenant commander in a staff corps, a third captain in another staff corps—not because of differences personal to themselves,

but because of a prevailing inequality of opportunity for promotion. In order to remedy this condition the statute provided for the assignment to each staff officer of a "running mate", a line officer ordinarily of the same approximate length of service, and directed that thereafter a staff officer should be eligible for consideration for advancement to the next higher rank (commander, captain or rear admiral) in the ordinary course when, and only when, his running mate or a junior line officer should become eligible for, or had previously attained, such rank; and in prescribed contingencies a new running mate should be assigned. The House Committee on Naval Affairs, reporting the bill (H. Rept. 579, 69th Cong. 1st Sess.), thus stated its purpose:

"The purpose of this bill is to provide (1) that staff corps officers shall have the same promotion, or the same opportunity for promotion, as officers of their own time in the line; (2) that qualified staff corps officers may be advanced at the same time as their qualified contemporaries in the line are promoted; and; (3) that this parity of opportunity and penalty shall be maintained from the date of such staff corps officers' entry into the service to the date of separation therefrom.

"To meet conditions as they exist at the present time, the bill provides that staff corps officers of any corps wherein promotion has been more rapid than promotion in the line shall mark time in their present position and rank until their running mates in the line, or line contemporaries, have overtaken them, and that thereafter they shall become eligible for promotion when such running mates are promoted. It immediately grants to all staff officers in those corps wherein promotion has lagged behind the line the same opportunity for immediate promotion as has already been enjoyed by their contemporaries or running mates of the line."

Section 1 defines "staff corps" as including the Medical, Supply, Chaplain, Construction, Civil Engineer and Dental Corps only, and directs that thereafter advancement to the ranks of commander, captain and rear admiral in such corps "shall be by selection only from staff officers of the next lower respective rank in the corps concerned upon the recom-

mentation of a board of naval officers"—a "staff selection board," provided for in section 2.

Section 3 directs that the Secretary of the Navy furnish each such board with the names and records of all staff officers rendered eligible for consideration and possible selection through the promotion or eligibility for promotion of their running mates, together with the number of officers to be selected for each rank. It is the duty of the board to consider carefully the case of every officer eligible and to certify only those who are "the best fitted of all those under consideration to assume the duties of the next higher rank." No officer may be certified by a board unless two-thirds of its members concur respecting his relative qualifications, and the total for any rank may not exceed the number specified by the Secretary; if a board recommend a less number than that specified the difference may be added to the number to be recommended by the next board. When the report of a board is approved by the President the officers therein certified are examined as to their professional and physical qualifications and, if successful in the examinations, may expect to be advanced to the next higher rank by the President by and with the advice and consent of the Senate.

Section 6, directing the initial assignment of running mates, in so far as here pertinent reads as follows:

"SEC. 6. Each staff officer commissioned in his corps prior to March 4, 1913, who has served continuously on the active list of said corps since that date, and who has not lost numbers for any cause since January 1, 1914, or who has not been passed over, shall be assigned as his running mate the junior line officer who appeared above him on the precedence list of the Navy as published in the Navy Register of January 1, 1914; * * *"

The officer thus assigned as the running mate of Commander (then Lieutenant Commander) Parsons was Commander Daniel T. Ghent, shortly thereafter promoted to captain through selection by a line board in session on the date the above Act was approved. It is not questioned that this assignment was correct and that no new assignment could be made save in some prescribed contingency as elsewhere provided by the statute. As indicated, Commander

Parsons then held the rank of lieutenant commander. By reason of the higher rank of his running mate he became eligible for consideration for advancement as provided by section 14, which reads as follows:

"SEC. 14. Hereafter a staff officer shall become eligible for consideration by a selection board for recommendation for advancement to the next higher rank when the President approves the report of a line selection board in which the running mate of such staff officer or a line officer junior to such running mate is recommended for promotion to the next higher rank above that held by such staff officer: *Provided*, That on the date of this Act a staff officer shall immediately become eligible for consideration by a selection board for recommendation for advancement to the next higher rank if his running mate or a line officer junior to such running mate has heretofore been permanently promoted to a rank above that now held by such staff officer or if his running mate or a line officer junior to such running mate has been recommended for such permanent promotion by the report of a selection board which has heretofore been approved by the President."

His name, together with thirty-eight others of the rank of lieutenant commander in the Supply Corps, was submitted to a selection board convened in the following month (July, 1926) as eligible to be considered for advancement to the rank of commander. Some had running mates of the rank of captain; others had running mates of the rank of commander. The board certified twenty-five, not including Commander (then Lieutenant Commander) Parsons, but including some officers who were junior to him in service. The Secretary had specified twenty-nine as the number to be recommended, contingent upon the recommendation of a stated number of commanders for advancement to captain; the board failed to certify the full number for captain and therefore was obliged to certify a number correspondingly less than that specified for commander.

It was then the view of the Department that, consequent upon this failure of the board to select him, section 10 became applicable and required the assignment to Commander (then Lieutenant Commander) Parsons of a new running mate. That section reads as follows:

"SEC. 10. If the running mate of a staff officer be promoted to a higher rank and such staff officer be considered by a selection board for such rank but fail to be selected for advancement thereto, by the report of such board as approved by the President, such staff officer shall have assigned as his new running mate the line officer not promoted who was next senior to his former running mate in the rank in which the staff officer remains; if there remain in that rank no line officer who was senior therein to such former running mate, such staff officer shall not have assigned a new running mate but shall retain his former running mate who has been promoted: *Provided*, That if subsequently selected such staff officer when advanced shall have assigned as a new running mate the senior line officer in the rank to which advanced who was promoted to that rank upon recommendation of the line selection board immediately succeeding the last staff selection board which considered such staff officer but did not recommend him for advancement in its report as approved by the President; * * *."

However, there being no "line officer not promoted who was next senior to his [Commander Parsons'] former running mate in the rank in which the staff officer remains," he was permitted for the time being to retain his previously assigned running mate, which is expressly provided for in such a contingency when section 10 is applicable.

A second selection board was convened four months later (in November, 1926) and Commander (then Lieutenant Commander) Parsons' name was again submitted along with others. This board recommended him, its report was approved, he passed the prescribed examinations, and was duly advanced to commander in the Supply Corps, being commissioned as such on February 14, 1928.

In accordance with the first proviso of section 10, of that section was applicable following the failure of the first board to recommend him, it now became necessary to assign, as a new running mate, "the senior line officer in the rank to which [Commander Parsons had been] advanced who was promoted to that rank upon recommendation of the line selection board immediately succeeding the last staff selection board which considered such staff officer but did not recommend him for advancement." But there was no

such officer, because no line board had been convened between the sessions of the first and second staff boards, and it was therefore impossible to assign a new running mate under section 10.

However, in reliance upon an opinion rendered by the Judge Advocate General in another case, it was concluded that section 10 had not been applicable at all, that the case properly fell within section 11, which follows:

"Sec. 11. If a staff officer shall lose numbers for any cause he shall have assigned as his new running mate the line officer who is the running mate of the junior of those officers in his corps who becomes or will become senior to him as the result of such loss of numbers."

Accordingly Commander Parsons was assigned a new running mate of the rank of commander upon the theory that he had lost numbers when the first board failed to recommend him.

The Act contains no definition of the term, "loss of numbers." The House Committee on Naval Affairs, reporting the bill (report, *supra*) explained section 11 as providing "for the assignment of a new running mate to staff officers who have been court-martialed and lost numbers or who have lost numbers as a result of failure on professional examination"—loss of numbers being an ordinary penalty inflicted by sentence of court martial and imposed by statutory direction when officers of prescribed lower ranks fail upon examination (U. S. C. Title 34, secs. 283, 284). In contradistinction to loss of numbers for such causes, the statute in numerous instances (e. g., section 6, *supra*) uses the term, "passed over," defined by section 5 as contemplating the case of an officer who "when eligible for consideration for selection for permanent advancement has failed to be so selected and an officer junior to him in the same rank and branch of the Navy has been selected and permanently advanced."

Notwithstanding any similarity of effect in particular cases, the distinction thus apparent is supported by reason. An officer losing numbers under sentence of court-martial is being punished for a fault, an officer failing in examination presumably has failed to maintain the required state of qualification. On the other hand, an officer passed over may

have undoubted qualifications but another, junior in service, has seemed to possess relatively higher ones.

The suggested conclusion accords with that of Attorney General Devens (17 Op. 56, 58), that an officer did not lose numbers through the promotion over him of others, selected for "the most efficient and faithful service" and "the highest professional qualifications and attainments." Commander Parsons was thus passed over, and this is not the same thing as losing numbers—clearly recognized by the statute.

Section 10 expressly provides in proper circumstances for the deferred assignment of a new running mate of the rank to which the staff officer shall subsequently have been advanced, but the words, "If the running mate of a staff officer be promoted to a higher rank and such staff officer be considered by a selection board for such rank but fail to be selected for advancement thereto * * *," can have no application to the case of Commander Parsons. By their natural import the words, "such rank," refer to the rank attained by the running mate upon his latest promotion, not an intermediate rank which he had previously filled, and, upon that view, Commander Parsons had not been considered for "such rank." There is additional reason why section 10 can have no application because, as indicated above, there was no officer who could be assigned as running mate to Commander Parsons at the time of his selection by the second board and no provision is made by the statute for the assignment of a new running mate thereafter.

From its terms and its legislative history it is clear that the primary purpose of this statute was that a staff officer in a corps where promotion had been slow should have an opportunity to attain the higher ranks reached through ordinary promotion by officers in the line, and for this purpose the device of a running mate was provided. Sections 10 and 11, providing for the assignment of new running mates under circumstances which they in terms specify, are therefore to be regarded as limitations upon the application of the principle of equality of opportunity for promotion in the different branches of the service, and their language should not be extended to authorize a change of running mates in cases which are not covered by their terms.

It is therefore my opinion that the statute did not require or authorize the assignment to Commander Parsons of a new running mate, and that he was entitled, after his advancement to Commander, to retain the running mate previously assigned to him.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE NAVY.

PORTO RICO—VALIDITY OF BOND ISSUE

The proposed issue for the Government of Porto Rico of bonds in the sum of \$150,000, the proceeds from the sale of which are to be used in the payment of the principal of, and interest on, bonds previously issued and sold for the construction, operation, and maintenance of the Isabela Irrigation System, being authorized by Congress and by Joint Resolution No. 12 of the Legislature of Porto Rico of July 3, 1929, and all the statutory requirements regarding the issue and sale of these bonds having been complied with, said bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of the People of Porto Rico.

DEPARTMENT OF JUSTICE,

December 9, 1930.

SIR: I have the honor to acknowledge receipt of your letter of December 1, 1930, stating that your Department has been authorized to sell for the account of the Government of Porto Rico bonds of the face value of \$150,000, the proceeds of which are to be used in the payment of the principal of, and interest on, bonds previously issued and sold for the construction of the Isabela Irrigation System and of the costs of maintenance and operation of said system until such time as the funds necessary for such purposes shall be produced from assessment levied upon lands included within the irrigation district.

The proposed bonds are to be issued under authority contained in section 3 of the Act of Congress approved March 2, 1917, entitled "An Act to provide a civil government for Porto Rico and for other purposes," as amended by the Act of March 4, 1927, (c. 145, 39 Stat. 951, 953; c. 503, 44 Stat. 1418; U. S. C. Title 48, Sec. 741, 745), and Joint Resolution No. 12 of the Twelfth Legislature of Porto Rico, approved

July 3, 1929, a copy of which was enclosed with your letter. The validity of a prior instalment of bonds authorized by the same Joint Resolution was sustained in my opinion of November 27, 1929 (36 Op. 107).

You state that the bonds are to be issued and sold by you at the request of the Treasurer of Porto Rico, in coupon form, in the denomination of \$1,000 each, to be dated January 1, 1931, and to bear interest at the rate of $4\frac{1}{2}$ per centum per annum, payable semiannually on January 1, and July 1, of each year, the principal thereof to be payable at the Treasury of the United States in series on July 1, 1970, and July 1, 1971. A copy of the form of the proposed bond is submitted with your letter and you request my opinion upon the legality of the issue.

Section 3 of the Act of March 2, 1917, as amended, provides:

“* * * and when necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Porto Rico or any municipal government therein as may be provided by law, and to protect the public credit: *Provided, however,* That no public indebtedness of Porto Rico and the municipalities of San Juan and Ponce shall be allowed in excess of 10 per centum of the aggregate tax valuation of its property * * *. In computing the indebtedness of the people of Porto Rico, municipal bonds for the payment of interest and principal of which the good faith of the people of Porto Rico has heretofore been pledged and bonds issued by the people of Porto Rico secured by bonds to an equivalent amount of bonds of municipal corporations or school boards of Porto Rico shall not be counted; but all bonds hereafter issued by any municipality or subdivision * * * for which the good faith of the people of Porto Rico is pledged shall be counted.”

The documents submitted with your letter show that the aggregate assessed valuation of real and personal property in Porto Rico on June 30, 1930, amounted to \$330,274,020, that on July 1, 1930, there were outstanding bonds of the Government of Porto Rico of the face value of \$28,898,000, and that since the amendatory Act of March 4, 1927, the good faith of the people of Porto Rico has been pledged to the payment of principal and interest on municipal bonds

aggregating \$1,361,500, which must be added to the foregoing. In addition thereto, there are now being prepared for issuance bonds of the Government of Porto Rico of the face value of \$500,000, to be dated July 1, 1930, which issue was the subject of my opinion of November 10, 1930, thus making a total of \$30,759,500 to be considered when ascertaining the total bonded indebtedness which the Government of Porto Rico is authorized to incur. Therefore, it is apparent that the proposed issue will not increase the bonded indebtedness beyond 10 per centum of the aggregate of the assessed valuation, the maximum permitted by law.

Sections 3 and 4 of Joint Resolution No. 12, supra, provide:

“SEC. 3. For the purpose of providing funds for the payment of principal of, and interest on, the bonds already issued and sold for the construction of the irrigation system, as well as for the operation and maintenance of said system until such time as the funds necessary for these purposes are produced by such assessments as may be levied on irrigated lands, as hereinbefore provided, and by the proceeds of other receipts, derived from said system, the Treasurer of Porto Rico is hereby authorized, empowered and directed to issue bonds of The People of Porto Rico to the amount of one million, two hundred and fifty thousand (1,250,000) dollars, or such part thereof as may be necessary.

“SEC. 4. Said bonds shall be sold on such terms as may be most favorable to The People of Porto Rico and shall be issued in series so that the proceeds of the sale thereof may be available on the dates and in the amounts stated below:

\$750,000 on January 1, 1930

150,000 on January 1, 1931

150,000 on January 1, 1932

100,000 on January 1, 1933

100,000 on January 1, 1934”

It is further provided by the Joint Resolution that the bonds may be in coupon or registered form, in denominations of one thousand, five thousand and (or) ten thousand dollars, shall bear interest at a rate not exceeding five per centum per annum, payable semi-annually, and shall be redeemable in series on prescribed dates and in prescribed amounts; that the bonds may be sold by the Secretary of

War or by the Treasurer of Porto Rico, with the approval of the Governor, upon such terms as may be most favorable to the People of Porto Rico, and that the Treasurer with the approval of the Governor, under the limitations prescribed therein, shall have absolute charge and authority in connection with all matters relating to said bonds; that the proceeds from the sale of the bonds shall be devoted to the payment of the principal of and interest on the bonds theretofore issued and sold for the construction of the irrigation system, and of the costs of operation and maintenance of the system until sufficient funds for these purposes are realized from the assessments levied by the Act. For the payment of both principal and interest the good faith of the People of Porto Rico is irrevocably pledged.

There was transmitted with your letter a statement, signed by the Treasurer of Porto Rico, setting forth his determinations in those matters left to his discretion, and this has been approved by the Governor, in accordance with the Joint Resolution.

I find that all the statutory requirements regarding the issue and sale of the said bonds have been complied with and that the form of bond submitted is in compliance with the law and the determinations of the Treasurer, approved by the Governor. The form of bond properly recites that "under the provisions of section 3 of the Act of Congress, approved March 2, 1917, as amended by the Act of March 4, 1927, this bond is exempt from taxation by the Government of the United States, or by the Government of Porto Rico or of any political or municipal subdivision thereof, or by any State, Territory, or possession, or by any county, municipality, or other municipal sub-division of any State, Territory, or possession of the United States or by the District of Columbia."

It is therefore my opinion that the bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of the People of Porto Rico.

Respectfully,

THOMAS D. THACHER,
Acting Attorney General.

To the SECRETARY OF WAR.

**LEGALITY OF APPOINTMENT OF CERTAIN MEMBERS OF THE
FEDERAL POWER COMMISSION**

Certain persons were nominated by the President for positions as members of the Federal Power Commission, and their nominations were considered by the Senate, which passed resolutions consenting to their appointment. Formal notification of this action was transmitted to the President by the Secretary of the Senate, and in reliance thereon the President made the appointments. Thereafter the President was requested to return to the Senate the notifications of confirmation. *Held*, under the circumstances herein stated, that what transpired in this case amounted to an expression by the Senate of its consent to these appointments and that the appointments were constitutionally made and became effective; and that the return of the papers to the Senate would serve no lawful purpose because no action which the Senate could now take would disturb or operate to revoke the appointments.

DEPARTMENT OF JUSTICE,

January 10, 1931.

SIR: You have asked my opinion on the legal aspects of the resolutions of the Senate, passed January 9, 1931, requesting you to return to the Senate the certified copies of the resolutions of the Senate expressing its consent to the appointment of George Otis Smith, Marcel Garsaud, and Claude L. Draper as members of the Federal Power Commission.

These men were nominated for these positions, and their nominations were considered by the Senate, which passed resolutions consenting to their appointment. Formal notification of this action was transmitted to you by the Secretary of the Senate, and in reliance thereon you made the appointments. The question is now presented whether, if you comply with the Senate's request and the Senate goes through the form of withdrawing its consent to the appointments, such action would have any legal effect or operate to remove or oust the appointees.

The nomination of Mr. Draper was confirmed on December 19, 1930, by the passage of a resolution in the following form:

"Resolved, That the Senate advise and consent to the appointment of the following-named persons to the offices named agreeably to their respective nominations: Federal

Power Commission. * * * Claude L. Draper, of Wyoming, to be a member for the term expiring June 22, 1931."

The nominations of Mr. Smith and Mr. Garsaud were confirmed by the passage of a similar resolution on December 20, 1930. In the cases of Smith and Draper, after the votes were taken the presiding officer caused to be entered in the Record without objection a statement that—

"The Senate advises and consents to the nomination, and the President will be notified." (74 Cong. Rec., Pt. 1, p. 1099; 74 Cong. Rec., Pt. 2, p. 1261.)

The Executive Journal of the Senate for December 19, 1930, in recording the passage of the resolution confirming the nomination of Draper, contains the following:

"Ordered, that the foregoing resolution of confirmation be forwarded to the President of the United States."

There is a similar entry and order in the Executive Journal of December 20, 1930, relating to the Smith appointment. In the case of Garsaud the Congressional Record does not disclose a statement by the presiding officer that the President would be notified, but the Executive Journal of the Senate for December 20, 1930, contains, in addition to the resolution consenting to the appointment of Garsaud, the following:

"Ordered, that the foregoing resolution of confirmation be forwarded to the President of the United States."

On December 20, 1930, the Senate recessed until January 5, 1931. On December 20, 1930, the Secretary of the Senate duly notified you of the confirmation of the nomination of Draper, and on December 22, 1930, the Secretary of the Senate duly notified you of the confirmations of Smith and Garsaud. In each case the notice was in the regular form, delivered by messenger, and consisted of a copy of the resolution of the Senate certified by the Secretary of the Senate. On December 22, 1930, in reliance upon these formal notifications that the Senate consented to the appointments, you appointed Smith, Garsaud, and Draper, who, on December 22, 1930, took the oath of office and entered upon the discharge of their duties. The appointments were effected by signing and delivering commissions to the appointees. On January 5, 1931, which was within two days of actual executive session of the Senate following the confirmation,

motions to reconsider the nominations, accompanied by motions to request the return of the notifications, were made in the Senate and, having been passed on the 9th of January, are now before you.

The action of the Senate in such matters is governed by Rule XXXVIII of the Standing Rules of the Senate, of which paragraphs 3 and 4 are as follows:

"3. When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual Executive session of the Senate; but if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion.

"4. Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by the Senate."

It is provided in Article II, section 2, of the Constitution that the President—

"shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; * * *."

This clause contemplates three steps. There is, first, the nomination, which is a mere proposal. Next comes action by the Senate consenting or refusing to consent to the appointment. Finally, if the Senate consents to the appointment there follows the executive act of appointment. It has long been recognized that the nomination and the appointment are different acts, and that the appointment is not effected by the Senate's so-called confirmation of the nomi-

nation. After the Senate has consented to the appointment, the nominee is not entitled to the office until the consent is followed by the executive appointment. After a nomination is sent to the Senate and has received the approval of that body, the President may, having changed his mind, decline to make the appointment. See *Marbury v. Madison*, 1 Cranch 137; 12 Op. 32, 42; 12 Op. 304, 306; 3 Willoughby on The Constitution, 2d Ed. (1929), sec. 987.

As the executive act of appointment follows the Senate's consent, the necessity for and the important function of a formal notification to the President, expressing the Senate's consent, become at once apparent.

Upon the foregoing facts the ultimate question in this case is whether the appointments were made with the consent of the Senate. If the appointments were made without that consent, they were ineffective and invalid, but if made with the Senate's consent the function of the Senate in respect of the appointments is ended.

The formal notifications of confirmation sent you by the Secretary of the Senate were sent by authority of the Senate before the expiration of the time allowed for reconsideration by paragraph 3 of Rule XXXVIII. While these orders for notification to the President did not explicitly state that the notifications should be sent forthwith, there seems to be no substantial dispute about the fact that the orders were so intended and that orders in that form for immediate notification of the President are in accordance with the traditional practice of the Senate, and that the Secretary of the Senate was justified in treating these orders as authority for immediate notification.

The contention has been made that although the Senate intended to and did convey to the President a formal notice of consent to the appointments, unconditional in form, there was an implied qualification that the Senate might reconsider and withdraw the consent, and therefore the President should have withheld action until the expiration of the period allowed by Senate rules for reconsideration.

While the Senate rules are not very explicit, a reasonable and fair interpretation, with a view to reconciling all their provisions and in the light of established legislative and executive practice, leads only to the conclusion that the Sen-

ate intended to and did constitutionally consent to your making the appointments when you did. Reasonably construed there is nothing about the rules which renders them obnoxious to any constitutional provision. One provision of these rules is that when a nomination is confirmed, a motion for reconsideration may be made within either of the next two days of actual executive session. This must be read in connection with paragraph 4, which provides that nominations confirmed or rejected shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider or while such a motion is pending "unless otherwise ordered by the Senate." That rule was intended to protect and preserve the power of the Senate to reconsider. It carries the inference that if notification of confirmation be transmitted to the President, the Senate loses the power of reconsideration if the President should act on the notification by making an appointment before a request for return of the notification is delivered to him.

The rules also plainly recognize that before the time for reconsideration has expired or even while a motion for reconsideration is pending, the Senate may order an immediate notification of its consent to the appointment to be transmitted to the President. If the Senate makes no order directing immediate notification to be sent to the President, the notification would be withheld until the expiration of the time allowed for reconsideration; but where the Senate orders a notification to be sent forthwith and without waiting for the expiration of the reconsideration period, some purpose must be attributed to that action. Why order immediate notification to be sent to the President unless he is expected to act upon it? The only conceivable purpose in expediting the notice is to make it possible for the President to expedite the appointment. If ordering the notification of confirmation to be sent to the President in advance of the expiration of the time allowed by the rules for reconsideration is not intended as a formal announcement and expression of the Senate's consent to an immediate appointment, the advanced notification would have no purpose whatever. The rules provide in such case for no second notification, and if the first one be not effective so that the Presi-

dent may rely on it, he never will receive a notification of final consent to the appointment. The President would never be able to rely on any notification and would be obliged to inform himself as best he might as to whether the Senate had finally consented to the appointment.

It has been suggested that even though a notification of the confirmation has been sent by the Senate to the President in advance of the expiration of the period allowed for reconsideration, it is subject to recall at the pleasure of the Senate without regard to what the President has done in reliance on it, and that this is implied in the provision in paragraph 3 of Rule XXXVIII to the effect that where a motion for reconsideration is made it shall be accompanied by a motion to request the President to return the notification. The fallacy of that argument rests in the assumption that paragraph 3 contemplates that the notification is under all circumstances subject to recall during the reconsideration period. This rule assumes that a request for a return of the notification may be effective if it reaches the President before he has made the appointment. In that case he would, no doubt, comply with the request. It also assumes that where nominations have been rejected and the President consequently makes no appointments, there is no difficulty about recalling the notification. It is consistent, however, with the idea that the request for return of the notification will be too late if it fails to reach the President before the appointment is made. Senate practice lends weight to these conclusions.

The position that the Senate did consent that these appointments be immediately made, subject to revocation on reconsideration by the Senate, is wholly untenable. That would allow the Senate to encroach upon executive functions by removing an officer within a limited time after his appointment because of dissatisfaction with his official acts. Any rule that provided for such a course would be void. The consent required by the Constitution is a consent absolute and irrevocable when acted on by the Executive. With such a condition attached it would be a case not of a void condition but of an invalid appointment. Either these appointments are valid because made with the unqualified con-

sent of the Senate or they are void. There is no middle ground.

Ordinarily the Senate is the judge of its own rules, but where it makes a retroactive interpretation applicable to past transactions which involve action of the executive branch of the Government, the question becomes a legal one and open to judicial inquiry. I can not escape the conclusion that, fairly construed, the rules of the Senate contemplate that where it orders notification of the Senate's consent to an appointment to be forthwith transmitted to the President without waiting for the expiration of the period for reconsideration, that action is intended as a deliberate expression to the President of the Senate's unqualified consent to the immediate appointment, and that it amounts to a decision by the Senate, not under suspension of its rules but in accordance with them, to place reconsideration beyond its power if the President should act and make the appointment before a request of the Senate for a return of the papers reaches him.

I am of the opinion, therefore, that what transpired in this case amounted to an expression by the Senate of its consent to these appointments and that the appointments were constitutionally made and became effective; and that the return of the papers to the Senate would serve no lawful purpose, because no action which the Senate could now take would disturb or operate to revoke the appointments.

Respectfully,

WILLIAM D. MITCHELL.

To the PRESIDENT.

ELIGIBILITY OF RETIRED ARMY OFFICER FOR THE OFFICE
OF COMMISSIONER OF THE DISTRICT OF COLUMBIA

A retired Army officer, who has the qualifications of citizenship and residence specified in section 2 of the Act of June 11, 1878 (20 Stat. 103), is eligible for appointment to the office of Commissioner of the District of Columbia

DEPARTMENT OF JUSTICE,

March 4, 1930.

SIR: I am transmitting herewith, for your information, a memorandum prepared in this Department, giving the

NOTE.—The publication of this opinion was temporarily withheld.

material on which was based my informal opinion to you of January 20th, last, that retired Army officers are eligible to appointment as Commissioners of the District of Columbia, provided they have the qualifications of citizenship and residence specified in the Act.

Further review of the pertinent statutes has tended to confirm the opinion heretofore expressed.

Respectfully,

WILLIAM D. MITCHELL.

To the PRESIDENT.

DEPARTMENT OF JUSTICE,
March, 3, 1930.

MEMORANDUM IN RE ELIGIBILITY OF A RETIRED ARMY OFFICER TO
HOLD THE POSITION OF COMMISSIONER OF THE DISTRICT OF
COLUMBIA

The question under consideration is whether a retired Army officer is eligible for appointment to the office of Commissioner of the District of Columbia, assuming that he has the qualifications of citizenship and actual residence in the District for three years next before his appointment, as specified in the Act relating to the District of Columbia. The question otherwise stated is whether a Commissioner having those qualifications is not appointed from "civil life" within the meaning of that phrase as used in the District of Columbia Act if he is a retired Army officer.

The Act of 1878, being the Act providing a permanent form of government for the District of Columbia (20 Stat. chap. 180, p. 103), contains the following provisions:

"SEC. 2. That within twenty days after the approval of this act the President of the United States, by and with the advice and consent of the Senate, is hereby authorized to appoint two persons, who, with an officer of the Corps of Engineers of the United States Army, whose lineal rank shall be above that of captain, shall be Commissioners of the District of Columbia, and who, from and after July first, eighteen hundred and seventy-eight, shall exercise all the powers and authority now vested in the Commissioners of said District, except as are hereinafter limited or pro-

vided, and shall be subject to all restrictions and limitations and duties which are now imposed upon said Commissioners. The Commissioner who shall be an officer detailed, from time to time, from the Corps of Engineers, by the President, for this duty, shall not be required to perform any other, nor shall he receive any other compensation than his regular pay and allowances as an officer of the Army. *The two persons appointed from civil life shall, at the time of their appointment, be citizens of the United States, and shall have been actual residents of the District of Columbia for three years next before their appointment, and have, during that period, claimed residence nowhere else, and one of said three Commissioners shall be chosen president of the Board of Commissioners at their first meeting, and annually and whenever a vacancy shall occur, thereafter; and said Commissioners shall each of them, before entering upon the discharge of his duties, take an oath or affirmation to support the Constitution of the United States, and to faithfully discharge the duties imposed upon him by law; and said Commissioners appointed from civil life, shall each receive for his services a compensation at the rate of five thousand dollars per annum, and shall, before entering upon the duties of the office, each give bond in the sum of fifty thousand dollars, with surety as is required by existing law. The official term of said Commissioners appointed from civil life shall be three years, and until their successors are appointed and qualified; but the first appointment shall be one Commissioner for one year and one for two years, and at the expiration of their respective terms their successors shall be appointed for three years. Neither of said Commissioners, nor any officer whatsoever of the District of Columbia, shall be accepted as surety upon any bond required to be given to the District of Columbia; nor shall any contractor be accepted as surety for any officer or other contractor in said District.*"

It will be noted that in enumerating the qualifications of the two Commissioners other than the Engineer, Congress did not specify that they should be civilians. It merely referred to them as "the two persons appointed from civil life." It assumed that they would be appointed from civil life. It

must have made that assumption because of some other statute. Therefore, in order to ascertain what was meant by the phrase "civil life" it is necessary to know what was the state of the law at that time respecting eligibility to civil posts of retired and active officers. If the law then disqualified retired officers, then Congress used the words "civil life" in the sense which would exclude retired officers. If, on the other hand, retired officers, returned to civil pursuits, were eligible, but active officers not, Congress no doubt used the words "civil life" as excluding only officers in active military service. To interpret this statute it is necessary to review the state of the law on these matters as of the date of the passage of the Act of 1878. The Act relating to the District of Columbia enacted next preceding the passage of the Act of 1878, above quoted, was the Act of June 20, 1874 (18 Stats., chap. 337, p. 116). That Act provided in section 2:

"SEC. 2. That the President of the United States, by and with the advice and consent of the Senate, is hereby authorized to appoint a commission, consisting of three persons, who shall, until otherwise provided by law, exercise all the power and authority now lawfully vested in the governor or board of public works of said District, except as hereinafter limited."

The Act did not specify any qualifications for the Commissioners. Section 3 of that Act provided:

"SEC. 3. That the President of the United States shall detail an officer of the Engineer Corps of the Army of the United States, who shall, subject to the general supervision and direction of the said board of commissioners, have the control and charge of the work of repair and improvement of all streets," etc.

The Act also provided:

"He shall receive no additional compensation for such services. And he shall not be deemed by reason of anything in this act contained to hold a civil office under the laws of the United States."

As will be shown hereafter, at the time of the enactment of that statute retired Army officers were eligible to the office of the civil post of Commissioner of the District of Colum-

bia, and any one of the three Commissioners provided for in the Act of 1874 might have been a retired Army officer. There was a statute in force at that time that prohibited officers on the active list from accepting a civil post, so that none of the three Commissioners provided for in the Act of 1874 could have been an officer on the active list. It will be noted that the Act of 1874 provided for detailing an officer of the Engineer Corps on the active list to certain work under the Commissioners, and provided that he should not be considered to hold a civil office. That was to prevent a forfeiture of his commission under another statute hereafter referred to. At the time of the passage of the Act of 1878, which we are now construing, retired Army officers were generally eligible to hold civil posts under the United States, and there was in effect a statute prohibiting an officer on the active list from accepting a civil office on penalty of forfeiting his commission.

Before considering further the meaning of the provisions of the Act of 1878, it is desirable at this point to refer to the statutes relating to the eligibility of retired and active officers to civil posts under the United States. The Act of July 15, 1870, which became section 1222 of the Revised Statutes of 1878, was as follows:

“No officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall be thereby vacated.”

With respect to retired officers, the first specific ruling which contains a comprehensive statement as to their eligibility to hold civil office appears in the opinion of Attorney General Devens, dated June 11, 1877 (15 Op. 308). Upon the statute in force then, and at the time of the passage of the District of Columbia Act, the Attorney General ruled in this language:

“Your second inquiry is whether a retired officer may hold a civil office under the United States Government.

“The provisions of the statutes in regard to retired officers direct that they may be assigned to duty at the Soldiers’ Home under certain circumstances, and that they

shall not be assignable to any other duty. (Rev. Stat., sec. 1259.) And, further, that they may on their own application be detailed to serve as professors in any college. (Sec. 1260.) It would not, in my opinion, be a legitimate construction of these two sections to say that they prohibit an officer from accepting or being appointed to a purely civil office under the United States Government. In the absence of any provision of law forbidding such officers to hold civil offices, especially when these sections are taken in connection with the law that officers upon the active list are (by section 1222 of the Revised Statutes) held to have vacated their commissions by the acceptance of any civil office, and that all officers who accept or hold appointments in the diplomatic or consular service are (by section 1223) considered as having resigned their places in the Army, with the exception above alluded to, *it must be considered that a retired officer is not precluded from holding a civil office under the United States Government, unless in the consular or diplomatic service.*"

This opinion was approved and the ruling renewed in an opinion by Attorney General W. H. H. Miller on April 13, 1889 (19 Op. 283). The Attorney General said (pp. 284-285):

"On the 11th of June, 1877, like questions were submitted to Attorney General Devens. In his reply (15 Opin. 306) he considers and interprets all the sections to which you refer, and declares: 'Sections 1763, 1764, and 1765, above referred to, are condensations from statutes which were in existence at the time that this decision (*Converse v. United States*) was made, and in conformity with it I deem it my duty, in answer to your inquiry, to say that a retired officer may draw his pay as such, and may also draw his salary of any civil office which he may hold under the Government, assuming always that the duties of the civil office are performed under and by virtue of a commission appointing him to that office which he holds in addition to his rank as a retired officer.'

"This interpretation is sustained by the Court of Claims in *Meigs v. United States* (19 C. Cls. R. 497), and by the Supreme Court in *Converse v. United States* (21 How. 464),

United States v. Brindle (10 U. S. R. 688), and *United States v. Saunders* (120 U. S. R. 126), in which last case Miller, J., delivering the opinion, declares:

“We are of opinion that, taking these sections (1763, 1764, and 1765) all together, the purpose of this legislation was to prevent a person holding an office or appointment, for which the law provides a definite compensation by way of salary or otherwise, which is intended to cover all the services which, as such officer, he may be called upon to render, from receiving extra compensation, additional allowances, or pay for other services which may be required of him either by act of Congress or by order of the head of his Department, or in any other mode, added to or connected with the regular duties of the place which he holds; but that they have no application to the case of two distinct offices, places, or employments, each of which has its own duties and its own compensation, which offices may both be held by one person at the same time. In the latter case he is in the eye of the law two officers, or holds two places or appointments, the functions of which are separate and distinct, and, according to all the decisions, he is in such case entitled to recover the two compensations.’

“I am of opinion that the above interpretation of sections 1259, 1763, 1764, and 1765, Revised Statutes, to which you refer, is well established alike by reason, precedent, and authority.”

By the Act of July 31, 1894 (28 Stat., chap. 174, sec. 2, p. 206; see Title 5, sec. 62, U. S. Code), Congress expressly recognized the eligibility of retired officers to hold any civil post to which they might be elected or to which the President might appoint them by and with the advice and consent of the Senate, in the following provisions:

“§ 62. *Holding other lucrative office.* No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially authorized thereto by law; but this shall not apply to retired officers of the Army or Navy whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate.

Retired enlisted men of the Army, Navy, Marine Corps, or Coast Guard retired for any cause, and retired officers of the Army, Navy, Marine Corps, or Coast Guard who have been retired for injuries received in battle or for injuries or incapacity incurred in line of duty shall not, within the meaning of this section, be construed to hold or to have held an office during such retirement."

In the Digest of Opinions of the Judge Advocate General of the Army, Revised Edition, 1901, section 2220, page 625, it was stated:

"There is no statute of the United States or regulation of the War Department which prevents a retired enlisted man of the Army from accepting an office or employment under either the United States or a State. *Held*, therefore, that there was no law or regulation of the United States which would prevent a retired enlisted man from organizing and drilling a militia company. (Card 3638, November, 1897.)"

As further evidence of the policy of Congress to render retired officers eligible to civil posts, reference may be made to section 1860, subdivision 4, Title XXIII, of the Revised Statutes of 1878, in which Congress, in legislating for the Territories, provided:

"No person belonging to the Army or Navy shall be elected to or hold any civil office or appointment in any Territory."

While that statute was in force, a retired officer of the United States Army was elected to a Territorial civil post and held by the Territorial court to be ineligible.

Hill v. Territory, 7 Pac. 63.

That was in 1882. At the very next session of Congress, an amendment was offered and passed to section 1860 of the Revised Statutes to make it read as follows:

"No person belonging to the Army or Navy shall be elected to or hold any civil office or appointment in any Territory except officers of the Army on the retired-list." (22 Stat. 567.)

The committee report explaining this amendment is disclosed in the following extract from the Congressional Record:

"Mr. RANDALL. I ask that the report accompanying the bill be read.

"The report was read, as follows:

"By the provisions of the several organic acts of the Territories the Legislatures thereof were invested with authority to prescribe the qualifications of elective officers therein, with certain specified restrictions. Among these restrictions was one declaring that "no person belonging to the Army or Navy shall be elected to or hold any civil office or appointment" in such Territories. These provisions, so restricted, are embodied in section 1860 of the Revised Statutes.

"At the time of their original enactment, no retired-list of Army officers existed. Evidently, then, this restriction was not intended to apply to such officers on such list. Since the legislation of Congress creating this list, and the reenactment of these provisions in the revision of the statutes, some of the Territorial courts have, however, so construed these statutes as to proclude this worthy class of persons from holding civil office.

"*Practically these persons are private citizens.* Their relations to the Army in no way interfere with their discharge of such official duty. In most if not all of the States their eligibility thereto remains unimpaired. No sound reason can be perceived why they should not enjoy a like privilege in the Territories. The legislative assembly of one of the Territories, by a unanimous vote of the members of both branches, has recently memorialized Congress in this behalf, and the same feeling appears to exist in the others.

"At all events this restriction upon the legislative power of the Territories, so far as it applies to these retired Army officers, should, your committee believe, be removed.

"The passage of the accompanying bill is therefore recommended."

Cong. Rec., vol. 14, pt. 1, p. 31.

In the Congressional Record, volume 14, part 1, page 473, in connection with this legislation, one Congressman referred to the fact

"that a retired Army officer in any of the States is at liberty to engage in employment in civil life."

and in another place in the Record (p. 473) it was said, referring to retired Army officers:

“They are mere pensioners and do not practically belong to the Army.”

The conclusion to be drawn from these statutes and authorities is that before, at the time of, and after the enactment of the District of Columbia Act of 1878, now under consideration, it was established that retired officers were eligible to civil posts under the United States or in the Territories, and the only limitation on this was provided in the Act of 1894, above quoted, to the effect that a retired officer could not receive his compensation as such and a salary of a civil post under the United States unless the civil post was an elective one or one to which he was appointed by the President by and with the advice and consent of the Senate.

It also is established that at the time of the enactment of the District of Columbia Act of 1878 an officer on the active list could not be detailed to a civil post without express authority of law, and could not accept a civil post without forfeiting his commission unless expressly relieved from such a restriction by Congress.

Turning now to the consideration of section 2 of the Act of 1878, and construing it in the light of the conditions above outlined, the question arises: Was it the intention of Congress, by the provisions of the District of Columbia Act, to render ineligible to the office of Commissioner of the District retired Army officers who were, by law, eligible to other civil posts under the Government? Was there any reason why Congress should have made an exception of the office of Commissioner of the District in giving general eligibility for civil posts to retired Army officers?

The Act of 1878 provided, first, for detailing an active officer of the Engineer Corps to act as one of the Commissioners. It also enumerated the qualifications of the other two Commissioners, to wit: that they should be citizens of the United States and actual residents of the District of Columbia for three years next before their appointment, without having claimed residence elsewhere during that period. The peculiar twist given to the reference to appointment from civil life is significant. The express enumeration of the qualifications of the two Commissioners other than

the engineer officer does not include a requirement that they shall be civilians. The Act, instead of specifically stating that they shall be appointed from civil life, merely assumes that they are to be appointed from civil life and refers to and describes them, as a convenient way of designating the two Commissioners other than the engineer officer, as "the two Commissioners to be appointed from civil life." In other words, what Congress did was not to create a rule of eligibility that they should be appointed from civil life, but to assume that such a rule existed and that they would necessarily be appointed from civil life. If such a rule of eligibility existed, it must have been by virtue of some other statute. It has been pointed out that there was no statute rendering ineligible retired officers, but there was a statute rendering ineligible active officers, so that the statute which Congress relied on, and assumed to require appointment from civil life, of the two Commissioners other than the Engineer Commissioner, was a statute that merely disqualified active officers. It seems reasonably clear, therefore, that in using the phrase "civil life" in this statute, Congress was referring to those engaged in civil life, whether or not retired Army officers, as distinguished from the military life of an officer in active service.

The reference, in the Act, to appointments from civil life is not a specific personal qualification, but a mere reference to that portion of society from which that appointee is to come. It is merely an assumption that he shall be selected from that body of persons in the community who are engaged in civil pursuits. There was no attempt by Congress in the Act of 1878 to establish any new personal qualifications for Commissioners other than that one should be an active engineer officer and the other two should be citizens having residence in the District of Columbia for three years next preceding appointment. If there had been an intent to depart from the policy established by Congress generally and to bar a retired Army officer, such an expression could have been very easily and plainly made to appear.

In using the term "civil life" Congress referred to the activity in life of the appointee. It is the taking of a person from one of two classes of society, military or civil. Military life is led when a person is in the active military

service of the Army and is doing duty in his daily life in carrying out military functions. If he is carrying on military work and that is his life's activity at the time, he is not from civil life, but if he has retired from that activity and his pursuits are civil, then he is from civil life. At least this appears to be the sense in which Congress used the phrase in this statute.

Under the previous Act of 1874 relating to the District of Columbia, retired officers were eligible to the post of District Commissioner. The only additional qualifications specifically provided for the two Commissioners other than the engineer officer were that they should be residents of the District for a stated period. It seems to have been the established policy of Congress in all legislation to make retired officers eligible for civil posts (except diplomatic posts abroad), so that the public might, in proper cases, have the benefit of the services of those retired Army officers who, by reason of ability, training, and experience, might be and become useful public servants in civil posts. If they are eligible for all other posts, elective or appointive by the President by and with the advice and consent of the Senate, what reason could Congress have had to render them ineligible only to the office of Commissioner of the District?

While a retired Army officer is subject to being recalled into military service in time of war, he is not subject to military service in time of peace without his consent. Unless brought back into the military service he is as much in civil life as any other person. There are, throughout the United States, large numbers of retired officers actually engaged in private business and participating to the fullest extent in the civil life of the communities in which they live, and it would be contrary to the ordinary understanding of words to say that they are in military life rather than in civil life.

In the case of *United States v. Tyler*, 105 U. S. 244, in construing a statute which provided for periodic increases of pay for Army officers, the court held that for the purposes of the statute relating to these increases in pay a retired Army officer was in the Military Establishment.

This decision and other similar rulings under other statutes have been sometimes referred to to show that a retired Army officer has a connection with the Military Establishment, and from that it is argued that he is not in civil life.

In the first place the phrase "appointed from civil life" in the District of Columbia Act must be construed in the sense in which it was used in that connection and in the light of the conditions with which Congress was dealing, and decisions which related to other statutes on other subjects are not necessarily controlling. Furthermore, the fact that a man has a definite connection with the Military Establishment and is subject to being called and recalled into the military service does not prevent him from being properly treated as in civil life.

There are thousands of officers in the Officers' Reserve Corps who now hold commissions and bear a definite relation to the Military Establishment. They are not only subject to call into the military service, as are retired officers, in time of war, but they are subject to being called into the military service in time of peace without their consent for limited periods, and to this extent they are more subject to military duty than are retired officers, who cannot be recalled into the service in time of peace without their consent. None will contend that reserve officers are not in civil life because of such relation to the Military Establishment.

It is true there are some other differences between them and retired officers, reserve officers only receiving compensation while in active service, and retired officers receiving what is called compensation but what is really a pension, notwithstanding they are no longer in the military service.

Both are alike in the sense that they are engaged in civil pursuits and active in the civil life of the communities in which they live, and are not in any proper sense in military life unless brought into or recalled into the military service.

In providing that one of the Commissioners shall be an Army engineer, the primary purpose was not to select an Army officer. A competent engineer was sought; his being a military officer was merely incidental. The selection of an officer from the Corps of Engineers made it likely that the Engineer Commissioner would be a man not a resident of the District and without much knowledge of the community or

local conditions. So, to provide that knowledge, it was specified that the other two Commissioners must have been residents of the District for three years. The choice is to be of two men identified with the community, as distinguished from the Engineer Commissioner, who may never have been so identified. The statute did not provide that the two Commissioners must have been three years in civil life, but only that they shall have resided here three years, and it took for granted that they shall be in civil life at the time of their appointment, that is, not then engaged in military pursuits, because, by other statutes, officers actively engaged in military life were disqualified. The length of time a retired officer resident in the District shall have been engaged in civil pursuits does not affect his eligibility. It only bears on his personal qualifications, which are matters of discretion and judgment for the appointing power and the Senate to consider in each case.

By an Act of May 12, 1917 (40 Stat. 72; U. S. Code, Title 10, sec. 371), it was provided:

"All officers and employees of the United States or of the District of Columbia who shall be members of the Officers' Reserve Corps shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be ordered to duty with troops or at field exercises, or for instruction, for periods not to exceed fifteen days in any one calendar year."

This seems to recognize that reserve officers are in civil life and not ineligible to the office of Commissioner of the District.

In *People v. Duane*, 121 N. Y. 367, the question was whether, under a state statute, a retired Army officer of the United States could hold a civil office. The court analyzes at length the status of retired officers and holds that while in retirement they are, in fact, pensioners, and exercise no functions of a military office.

The conclusions to be drawn from this material are:

First: That prior to the enactment of the District of Columbia Act of 1878 all three of the Commissioners of the District might have been retired Army officers.

Second: That before, at the time of, and ever since the enactment of the District of Columbia Act of 1878 retired

Army officers have been, by law, eligible for any civil post under the United States, elective or to be filled by the President by and with the advice and consent of the Senate, except diplomatic posts abroad.

Third: That no sufficient reason can be advanced to support the view that by the Act of 1878 Congress intended to depart from this practice and specifically render retired Army officers ineligible to the post of Commissioner of the District.

Fourth: That in enumerating the qualifications of the two Commissioners other than the Engineer Commissioner in the Act of 1878, Congress did not specifically direct that they should be in civil life when appointed. Its reference to the two Commissioners as the two "appointed from civil life" is not the establishment of a specific qualification, but an assumption that under existing law only persons from civil life were eligible; and since under the existing law only active military officers, and not retired officers, were ineligible, the phrase "civil life" must be construed to refer to the civil life of those engaged in civil pursuits, including retired officers, in contrast with the military life of active Army officers.

Fifth: The phrase "the two to be appointed from civil life," contained in the District Act, must be construed in the sense in which it was used in this particular statute.

Sixth: To hold that a person is not in civil life who at one time has been in the military service, and who is subject to call or recall into the military service by reason of definite connection with the Military Establishment, would be to render ineligible not only retired officers but possibly reserve officers.

Seventh: Retired officers who have ceased to engage in military service and have entered civil life and civil pursuits, and are not subject to call into the military service in time of peace except with their consent, are in civil life within the meaning of the District Act and eligible to appointment to the office of Commissioner.

WILLIAM D. MITCHELL.

APPROVAL OF BILLS AFTER ADJOURNMENT OF CONGRESS

The President has the power to approve bills after the final adjournment of Congress, provided he acts within 10 days, Sundays excepted, after the bills have been presented to him.

DEPARTMENT OF JUSTICE,

March 4, 1931.

SIR: You have requested my opinion on the question whether you can approve bills after the expiration of the present Congress on March fourth but within ten days, Sundays excepted, after they have been presented to you.

Article 1, section 7, Clause 2, of the Constitution provides:

“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.”

It appears to be settled that this provision of the Constitution permits executive approval to be given within ten days and after the adjournment of a session. That was the case dealt with by Attorney General Palmer in an opinion to President Wilson in June, 1920. (32 Op. 225.) The only question left is whether there is any distinction to be made between the end of a session and the final adjournment of a Congress.

The earliest record of a discussion as to the power of the President to approve bills after adjournment was during the administration of President Monroe in 1824. It is mentioned by John Quincy Adams in his diary (6 Memoirs of John Quincy Adams, 1875, 379, 380). It is there said that Attorney General Wirt thought the President had such power, and Adams agreed with him. Calhoun took the opposite view. The President did not then attempt to approve bills after adjournment.

The next instance which has come to my attention in which the question arose was in 1863. On March 12, 1863, eight days after the final adjournment of the Thirty-seventh Congress, President Lincoln approved a bill which became the Abandoned and Captured Property Act of 1863. In June, 1864, after consideration of this action, the Committee of the Judiciary of the House of Representatives reported to the House its conclusion that the Act of March 12, 1863, was not in force because approved after Congress had adjourned, but the House which was considering a measure to amend the Abandoned and Captured Property Act took no action approving the report of the Committee, and legislation was passed which did not in terms reenact but treated as an existing statute, and amended in the regular way, the so-called Abandoned and Captured Property Act. The full history of these transactions will be found in *United States v. Alice Weil*. (29 Ct. Cls. 523.)

In 1887 President Cleveland considered whether he could approve a bill after adjournment. It has been said Attorney General Garland advised him that he could not, but there is no record in this Department of such an opinion. (32 Op. 230.) Again, in the administration of President Wilson the question arose and the opinion of the Attorney General was asked and rendered as set forth above and, acting upon that opinion and after the adjournment of Congress, the President approved a number of bills, the validity of which never seems to have been questioned because of the date of approval. (Yale Law Journal, Vol. XXX, No. 1, p. 1.) The most important of these was the Federal Water Power Act, creating the Federal Power Commission.

Except in the instances stated the Presidents appear to have followed the practice of approving bills before adjournment.

Two reasons have generally been urged to support the contention that to be effective the approval of a bill must be given while Congress is in session.

The one suggested by the Judiciary Committee of the House in 1864 was that if the President had authority to sign after adjournment there was no limit on the time within which he might act and the public would be kept in suspense as to whether the legislation was to become effective. This argument has since been refuted, and it seems clear from the terms of section 7 of Article 1 of the Constitution that the President must give his approval, if at all, within ten days after a bill is presented to him, and that, after Congress has adjourned, if he does not approve a bill within ten days after it has been presented to him, the bill fails to become a law and can not be revived by subsequent approval.

The other reason generally urged is that in exercising his function of approving legislation the President is a part of the Congress and that he can not function when Congress is not in session. This contention is not based on any words of the Constitution and is nothing but a theory, and was rejected in part by the Supreme Court of the United States in *La Abra Silver Mining Company v. United States*. (175 U. S. 423, 454.) Both these arguments were fully considered and refuted in the opinion of Attorney General Palmer in 1920, with the reasoning of which I am in full accord.

In all the discussion of this subject no distinction has heretofore been drawn between the end of a session and the end of a Congress. Arguments against the power of the President to sign bills after adjournment are no greater or less in the one case than in the other. In an article on this subject, in Vol. XXX of the Yale Law Journal, No. 1, p. 22, mention is made of the situation which would exist where the term of the President ends at the same time that a Congress finally adjourns, but that situation is not likely to present any difficulty as the old Congress which has

passed the bill is not in existence to present it for approval to the incoming President. It is true that except in the few instances given, Presidents have made a practice of approving bills before adjournment, but this construction is of a negative character and is not an affirmative assertion of a rule that approval must be given, if at all, before adjournment, and the practice seems to have been followed as a matter of tradition and out of abundant caution to avoid rather than to decide the question, and heretofore the Presidents have generally been able to avoid the question by considering and acting on all bills before adjournment.

At the present session of Congress, however, there have been transmitted to you by Congress for consideration from February twenty-eighth to the noon of March fourth, two hundred and sixty-nine bills, and during the last twenty-four hours of the session there have been transmitted to you for consideration one hundred and eighty-four bills, many of great importance. It is impossible for a President to give adequate consideration to such a large number of measures presented so short a time before adjournment.

My conclusions on the subject may be summed up as follows:

1. There is nothing in the words of the Constitution to sustain the contention that approval must be given prior to adjournment.

2. There is no good reason why approval should occur while Congress is in session, as the Congress has no further function to perform in respect of bills which have been approved.

3. The public interest would suffer and not gain by the requirement that the President must act before adjournment. That would prevent him from giving that careful consideration to all the measures submitted to him which the public interest requires.

My opinion is that there is no distinction to be drawn between the adjournment of a session and the final adjournment of a Congress and that you have power to approve bills after the adjournment of Congress on March

4, 1931, provided you act within ten days from the dates the bills were presented to you.

Respectfully,

WILLIAM D. MITCHELL.

To the PRESIDENT.

SATURDAY HALF HOLIDAY LAW

As affecting employees embraced within the terms of the Act of March 3, 1931, providing a Saturday half holiday for certain Government employees (46 Stat. 1482), Saturday is to be counted as four hours rather than as a full day in computing annual leave under the Act of March 3, 1893 (27 Stat. 715), as amended, but in computing sick leave under the latter Act Saturday is to be counted as a full day.

DEPARTMENT OF JUSTICE,

March 17, 1931.

SIR: I have the honor to comply with your request of March 7, 1931, for my opinion concerning the construction to be placed upon the Act of March 3, 1931, c. 396 (46 Stat. 1482), entitled "An Act Providing for Saturday half holidays for certain Government employees," with respect to whether or not Saturdays shall be considered as full days for purposes of computing annual leave and sick leave.

The Act provides as follows:

"That on and after the effective date of this Act four hours, exclusive of time for luncheon, shall constitute a day's work on Saturdays throughout the year, with pay or earnings for the day the same as on other days when full time is worked, for all civil employees of the Federal Government and the District of Columbia, exclusive of employees of the Postal Service, employees of the Panama Canal on the Isthmus, and employees of the Interior Department in the field, whether on the hourly, per diem, per annum, piecework, or other basis: *Provided*, That in all cases where for special public reasons, to be determined by the head of the department or establishment having supervision or control of such employees, the services of such employees can not be spared, such employees shall be entitled to an equal shortening of the workday on some other day: *Provided further*, That the provisions of this Act shall not de-

prive employees of any leave or holidays with pay to which they may now be entitled under existing laws."

The Act of March 3, 1893, c. 211, 27 Stat. 675, 715, as amended by the Acts of March 15, 1898, c. 68, 30 Stat. 277, 316, July 7, 1898, c. 571, 30 Stat. 652, 653, and February 24, 1899, c. 187, 30 Stat. 846, 890, prescribes hours of labor in the Executive Departments and provides for annual leave and sick leave. As now incorporated in the United States Code (U. S. C., title 5, secs. 29-30), the amended Act reads as follows:

"It shall be the duty of the heads of the several executive departments, in the interest of the public service, to require of all clerks and other employees, of whatever grade or class, in their respective departments, not less than seven hours of labor each day, except Sundays and days declared public holidays by law or Executive order. The heads of the departments may, by special order, stating the reason, further extend the hours of any clerk or employee in their departments, respectively; but in case of an extension it shall be without additional compensation.

"The head of any department may grant thirty days' annual leave with pay in any one year to each clerk or employee, such leave to be exclusive of Sundays and legal holidays. Where some member of the immediate family of a clerk or employee is afflicted with a contagious disease and requires the care and attendance of such employee, or where his or her presence in the department would jeopardize the health of fellow clerks, and in exceptional and meritorious cases, where a clerk or employee is personally ill, and where to limit the annual leave to thirty days in any one calendar year would work peculiar hardship, it may be extended, in the discretion of the head of the department, with pay, not exceeding thirty days in any one case or in any one calendar year. This section shall not be construed to prevent the head of any executive department from granting thirty days' annual leave with pay in any one year to a clerk or employee, notwithstanding such clerk or employee may have had during such year not exceeding thirty day's leave with pay on account of sickness. Nor shall it be construed to mean that so long as a clerk or employee is borne upon the rolls of the department in excess of the

time herein provided for or granted that he or she shall be entitled to pay during the period of such excessive absence, but that the pay shall stop upon the expiration of the granted leave."

Attorney General Olney, in an opinion of February 10, 1894 (20 Op. 716, 718), construing the Act of March 3, 1893, held that when computing both annual leave and sick leave Sundays and holidays occurring during the absence should be charged against the leave of the employee. Subsequently, the amendment of February 24, 1899, directed "that the thirty days' annual leave of absence with pay in any one year to clerks and employees in the several Executive Departments authorized by existing law shall be exclusive of Sundays and legal holidays." It will be observed that the amendment made no change in the matter of computing sick leave.

Since 1904, various Executive orders, issued from time to time, have prescribed periods of less than seven hours for a day's work on Saturday during the summer months. Generally, these orders have differed in language in no material respect from that of May 9, 1927 (the latest one), which is copied below:

"It is hereby ordered that from the first Saturday of June to the last Saturday of September, both inclusive, of each year until further notice, four hours, exclusive of time for luncheon, shall constitute a day's work on Saturdays for all clerks and other employees of the Federal Government, wherever employed; and all Executive or other orders in conflict herewith, except the Executive order of April 4, 1908, relating to certain naval stations, are hereby revoked.

"Provided, however, that this order shall not apply to any bureau or office of the Government, or to any of the clerks or other employees thereof, that may for special public reasons be excepted therefrom by the head of the Department or establishment having supervision or control of such bureau or office, or where the same would be inconsistent with the provisions of existing law."

While it is perhaps unnecessary to consider the source of the President's power to issue such orders, it is worthy of note that Saturday afternoon has been made a legal holiday by law in the District of Columbia (25 Op. 40, 45)

and is commonly known to be observed as such by law or custom in various other parts of the country. (See Cong. Rec., v. 74, p. 6739; H. Rept. 1498, 71st Cong.) Under the statute, if a day is made a holiday by law or Executive order the requirement of seven hours of labor does not apply, and, considering Saturday afternoon as such a holiday, it was competent to prescribe the hours of labor by administrative action. (22 Dec. Compt. 217, 219.)

The cited opinion of the Comptroller (1915) recognized a practice in the Treasury Department of charging four hours toward annual leave for absences on Saturdays affected by the Executive orders. It appears from inquiries that the same practice has generally prevailed in the other departments, at least since that time. In the matter of sick leave, on the other hand, it appears that the practice generally has been to consider such Saturdays as full days—and upon this it may be remarked that since Sundays and holidays are charged when intervening during periods of sick leave, under the opinion of February 10, 1894, the conclusion that Saturday afternoons also should be included is irresistible.

Thus for many years prior to the passage of the Act of March 3, 1931, there had been substantial uniformity of practice in the various Departments of charging Saturdays affected by the Executive orders as full days in computing sick leave and as four hours in computing annual leave. This was quite consistent with the statute as amended by the Act of February 24, 1899, and is to be taken as settled administrative construction of that Act and of the Executive orders which were issued consistently with its terms. The Act of March 3, 1931, employed the language of these Executive orders, and in so doing is to be understood as adopting the administrative construction which prevailed before its passage. It is entitled "An Act Providing for Saturday half holidays for certain Government employees." The Comptroller General, in an opinion of March 7, 1931, has declared that "As to employees whose regular work day is eight hours the statute grants a half holiday, and as to employees whose regular work day is seven hours the statute grants a part holiday of three hours." The half or part holiday thus granted is within the purview of the

amendment of February 24, 1899, which provided that the annual leave "shall be exclusive of * * * legal holidays." This amendment had specific reference to annual leave. There has been no such amendment with reference to sick leave, and under the ruling of Attorney General Olney, Saturdays, Sundays, and holidays must be included in computing sick leave.

Conclusion follows that in so far as employees embraced within the terms of the Act of March 3, 1931, are concerned Saturday is to be counted as four hours rather than as a full day in computing annual leave, under the Act of March 3, 1893, as amended, but in computing sick leave under that Act is to be counted as a full day.

Respectfully,

THOMAS D. THACHER,
Acting Attorney General.

To the PRESIDENT.

AWARDS OF MIXED CLAIMS COMMISSION

The amounts paid to the Mechanics Securities Corporation and the Equitable Trust Company by the Alien Property Custodian subsequent to the entry of the awards should be considered as payments "credited by the Mixed Claims Commission in making its award," and should be deducted from the principal amount of the award in each case. This reduces the amount of each award to an amount which does not exceed \$100,000, and the Secretary of the Treasury is accordingly authorized, under section 4 (c), 3 of the Settlement of War Claims Act of 1928 (45 Stat. 260, 261) to make payment to each of the claimants without deducting from the amount of such payment the amount of the payments received from the Alien Property Custodian.

DEPARTMENT OF JUSTICE,
March 28, 1931.

SIR: I have the honor to acknowledge receipt of your letter of April 17, 1930, enclosing additional data on the subject matter of your letter of August 20, 1928, and to comply with your request for my opinion as to the interpretation of section 4, subsection (g), of the Settlement of War Claims Act of 1928, (Act of March 10, 1928, c. 167, 45 Stat. 254, 260, 262), as applied to advances from the German Special Deposit Account on awards of the Mixed

Claims Commission, United States and Germany, in favor of the Mechanics Securities Corporation and the Equitable Trust Company, respectively.

It appears that each of these companies held matured notes of the face value of \$500,000. of the Imperial German Government. They, together with fifteen other American nationals holding such notes aggregating a total face value of \$2,476,000. instituted proceedings against the Alien Property Custodian and the Treasurer of the United States under the Trading with the Enemy Act, (Act of October 6, 1917, c. 106, Sec. 9, 40 Stat. 411, 419, as amended by the Acts of June 5, 1920, c. 241, 41 Stat. 977, and March 4, 1923, c. 285, 42 Stat. 1511), and obtained decrees which directed payment of the notes out of German Government funds seized and held by the defendants. (*White v. Mechanics Securities Corporation*, 269 U. S. 283.) The fund upon which the decrees operated was insufficient for their discharge in full, and by agreement of the seventeen claimants bearing date January 6, 1926, a pro rata distribution was made, which did not, however, exhaust the fund, and it was understood that additional payments would be made.

Eight of the seventeen holders of these notes who had recovered decrees against the Alien Property Custodian likewise filed claims against the Government of Germany with the Mixed Claims Commission, created pursuant to the agreement between the United States and Germany of August 10, 1922, 42 Stat. 2200.

On January 19, 1928, the Commission entered separate awards in favor of these claimants for the principal amounts still due on the notes which they held, together with interest from January 14, 1926, to date of payment. Such awards were made to the Mechanics Securities Corporation in the principal amount of \$160,492.48 and to the Equitable Trust Company in the principal amount of \$160,492.45. When these awards were made the Commission knew that additional payments would be made in the near future upon the judgments recovered by the claimants and payable by the Alien Property Custodian, and in anticipation of such payments it provided in each award:

“Should any further amounts be recovered on said notes in litigation or otherwise, under the provisions of the Trading with the Enemy Act of October 6, 1917, and amendments thereto, said amounts shall be credited to the amount awarded herein.”

This provision was drawn in anticipation of legislation then pending in Congress, which ultimately resulted in the enactment of the Settlement of War Claims Act of 1928, and particularly section 4 (g) thereof, which provided:

“(g) There shall be deducted from the amounts first payable under this section to any American national in respect of any debt the amount, if any, paid by the Alien Property Custodian in respect of such debt which was not credited by the Mixed Claims Commission in making its award.”

On May 1 and May 4, 1928, additional payments were made to the noteholders by the Alien Property Custodian sufficient in amount to reduce the claims of the Mechanics Securities Corporation and the Equitable Trust Company to \$91,578.66 and \$91,578.63, respectively.

Nine of the seventeen claimants who had recovered judgments were late in filing claims under the agreement of August 10, 1922, and were unable to file their claims with the Commission until after the agreement between the United States and Germany of December 31, 1928, 45 Stat. 2698, had provided for the consideration of late claims. These late claimants were granted awards by the Mixed Claims Commission under date of January 19, 1929. At the time these awards were made payments of all moneys available to satisfy the judgments had been received, and accordingly the awards in these nine cases took account of the payments previously made by the Alien Property Custodian in May, 1928.

Thus it appears that of the seventeen claimants who reduced their claims to judgment against the Alien Property Custodian, eight awards were made in January 1928, in each of which it was provided that future payments on the judgment should be credited upon the award, and nine were made in January 1929, upon which the payments which had all been made in May, 1928, were credited.

The late claimants, whose indebtedness after crediting the amounts received from the Alien Property Custodian did not exceed the sum of \$100,000 have, I understand, all been paid in full out of the Special Deposit Account created by the Settlement of War Claims Act, c. 167, 45 Stat. 254, and if I understand your inquiry correctly you desire to be advised whether the Mechanics Securities Corporation and the Equitable Trust Company, whose awards were made prior to the receipt of payments from the Alien Property Custodian which have reduced the amounts owing to them below \$100,000, may also be paid in full from the Special Deposit Account in view of the provisions of section 4 (g) of the Settlement of War Claims Act.

It will be noted at once that to hold otherwise would lead to inequitable treatment of creditors whose claims are of equal rank, in that those who delayed the presentation of their claims will as the result of their lack of diligence enjoy a preferred position. In my opinion, a proper interpretation of the statute leads to no such result. The question depends, of course, upon the proper interpretation of section 4 (g) read in connection with the other pertinent sections of the Settlement of War Claims Act, as follows:

"SEC. 2. (a) The Secretary of State shall, from time to time, certify to the Secretary of the Treasury, the awards of the Mixed Claims Commission, United States and Germany, established in pursuance of the agreement of August 10, 1922, between the United States and Germany (referred to in this Act as the 'Mixed Claims Commission').

"(b) The Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of each award so certified, plus the interest thereon, in accordance with the award, accruing before January 1, 1928.

* * * * *

"(d) The payments authorized by subsection (b) or (c) shall be made in accordance with such regulations as the Secretary of the Treasury may prescribe, but only out of the German special deposit account created by section 4, within the limitations hereinafter prescribed, and in the order of priority provided in subsection (c) of section 4."

* * * * *

"SEC. 4. (a) There is hereby created in the Treasury a German special deposit account, into which shall be deposited all funds hereinafter specified and from which shall be disbursed all payments authorized by section 2 or 3, including the expenses of administration authorized under subsections (c) and (m) of section 3 and subsection (e) of this section.

* * * * *

"(c) The Secretary of the Treasury is authorized and directed, out of the funds in such special deposit account, subject to the provisions of subsection (d), and in the following order of priority—

"(1) To make the payments of expenses of administration authorized by subsections (c) and (m) of section 3 or subsection (e) of this section;

"(2) To make so much of each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), as is attributable to an award on account of death or personal injury, together with interest thereon as provided in subsection (c) of section 2;

"(3) To make each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), if the amount thereof is not payable under paragraph (2) of this subsection and does not exceed \$100,000, and to pay interest thereon as provided in subsection (c) of Section 2;

"(4) To pay the amount of \$100,000 in respect of each payments authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), if the amount of such authorized payment is in excess of \$100,000 and is not payable in full under paragraph (2) of this subsection. No person shall be paid under this paragraph and paragraph (3) an amount in excess of \$100,000 (exclusive of interest beginning January 1, 1928), irrespective of the number of awards made on behalf of such person;

"(5) To make additional payments authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), in such amounts as will make the aggregate payments (authorized by such subsection) under this paragraph and paragraphs (2), (3), and (4) of this

subsection equal to 80 per centum of the aggregate amount of all payments authorized by subsection (b) of section 2. Payments under this paragraph shall be prorated on the basis of the amount of the respective payments authorized by subsection (b) of section 2 and remaining unpaid.

* * * * *

“(g) There shall be deducted from the amounts first payable under this section to any American national in respect of any debt the amount, if any, paid by the Alien Property Custodian in respect of such debt which was not credited by the Mixed Claims Commission in making its award.”

The purpose of this statute was to create a Special Deposit Account from which payments on account of awards by the Mixed Claims Commission should be made, and to provide priorities as between claimants holding awards entitled to payment out of the fund. The purpose to treat claimants of equal priority upon a basis of equality is entirely clear. Section 4 (g) was intended merely to prevent double payment, as the legislative history clearly shows. Senate Report No. 273, 70th Congress, 1st Session, p. 22; House Report No. 17, 70th Congress, 1st Session, pp. 17-18. This section was not designed or intended in any way to reject the equality of treatment as between claimants enjoying equal priority provided for in the preceding sections, and to give it such an effect would do violence to the plan and purpose of the statute. The language of section 4 (g) compels no such result, for the awards in this case expressly require that there shall be credited upon the award all amounts received from the Alien Property Custodian. Had the Mixed Claims Commission formally recalled these awards after the payments were made, and amended them so as to show that the amounts received had been credited thereon, your authority under the terms of section 4 (g) and the other provisions of this statute to pay the amounts due to these claimants in full out of the fund could not have been questioned. The direction in each award that the credit should be made was clearly intended to operate as a satisfaction pro tanto of the award itself. The letter from the United States Agent to you under date of April 10, 1930, shows that the phraseology of the last sentence in the

awards, relating to credits of amounts recovered under the provisions of the Trading with the Enemy Act, was expressly designed to bring the awards within the provisions of section 4 (g). It is only by the most formal reasoning that it can be said that the amounts received have not been credited upon the award. In order to avoid a result which is contrary to the purpose of the law, one must, if possible, adopt constructions consistent with the statutory purpose.

Accordingly, section 4 (g) should be interpreted so as to permit the credits upon the award, as directed by the Commission, and not to require the deduction of the amount of these credits from payments to be made from the Special Deposit Account. Any other interpretation, as this case very well illustrates, would make priority of payment between claimants of equal rank depend upon whether they recovered their awards before or after receipt of payments from the Alien Property Custodian—a result so contrary to the statutory purpose as to compel the interpretation which I have adopted.

I am therefore of the opinion that the amounts paid to each of these claimants by the Alien Property Custodian subsequent to the entry of the awards should be considered as payments “credited by the Mixed Claims Commission in making its award,” and should be deducted from the principal amount of the award in each case. This reduces the amount of each award to an amount which does not exceed \$100,000, and you are accordingly authorized, under section 4 (c), (3), to make payment to each of the claimants without deducting from the amount of such payment the amount of the payments received from the Alien Property Custodian.

Respectfully,

WILLIAM D. MITCHELL.

TO THE SECRETARY OF THE TREASURY.

141183°—32—VOL 36—27

AIRPLANES—ESTIMATES FOR APPROPRIATIONS

The War Department, in preparing estimates for future appropriations, is justified in treating as unserviceable, and exclusive of the 1,800 serviceable airplanes authorized by section 8 of the Air Corps Act of July 2, 1926 (44 Stat. 783), those in a condition which require general overhauling and repair at the Air Corps depots.

DEPARTMENT OF JUSTICE,

May 13, 1931.

Sir: I have the honor to acknowledge receipt of letter of April 20 asking my opinion as to whether the War Department, in preparing estimates for future appropriations, is justified in treating unserviceable planes as not included in the 1,800 airplanes which the Secretary of War is authorized to maintain by section 8 of the Air Corps Act of July 2, 1926, c. 721, 44 Stat. 780, 783-784, which reads as follows:

“EQUIPMENT.—The Secretary of War is hereby authorized to equip and maintain the Air Corps with not to exceed one thousand eight hundred serviceable airplanes, and such number of airships and free and captive balloons as he may determine to be necessary for training purposes, together with spare parts, equipment, supplies, hangars, and installations necessary for the operation and maintenance thereof. In order to maintain the number specified above, the Secretary of War is hereby authorized to replace obsolete or unserviceable aircraft from time to time: *Provided*, That the necessary replacement of airplanes shall not exceed approximately four hundred annually: *Provided*, That the total number of airplanes and airships herein authorized shall be exclusive of those waiting salvage or undergoing experiment or service tests, those authorized by the Secretary of War to be placed in museums and those classified by the Secretary of War as obsolete: *And provided further*, That the total number of planes authorized in this section shall include the number necessary for the training and equipment of the National Guard and the training of the Organized Reserves as may be determined by the Secretary of War.”

You inform me that on January 11, 1930, you promulgated the following definitions relating to the serviceability of airplanes for the guidance of the Air Corps in the ad-

ministration of that Act in all cases where the question of the serviceability of airplanes arises:

"(a) 'Serviceable airplanes include those fit for immediate service in the air and those which are economically repairable locally.

"(b) 'Unserviceable airplanes include those not economically repairable locally and which must be sent to Air Corps depots for general repair or overhaul. Upon completion of such repair or overhaul at depots, such airplanes again become serviceable and must again be counted as part of the 1,800 serviceable airplanes provided by the Air Corps Act of July 2, 1926.'"

Your request for an opinion refers to an opinion of the Judge Advocate General of the Army, dated April 17, 1931, copy of which is before me, and I have referred to that for information as to the precise questions you are interested in. It appears that the ultimate question in the case is as to what constitutes an unserviceable airplane or possibly whether the standards for determining what airplanes are serviceable, contained in the definitions promulgated by you January 11, 1930, are consistent with the terms of the statute.

Congress has not defined what it meant by a serviceable airplane. The statute leaves to you the power to lay down reasonable tests of serviceability. You define as unserviceable, airplanes which are so badly out of repair that they may not be economically repaired locally and require general repairing or overhauling at one of the Air Corps depots, treating as serviceable those airplanes which, although out of repair and not fit for immediate service, do not require general repair or overhauling at the Air Corps depots.

I see no ground for an opinion that these tests of serviceability are unreasonable or arbitrary or not in accordance with the purpose of the statute. Certainly a plane which requires extensive overhauling before it may properly be used is not serviceable while in that condition and it is sent to the Air Corps depot for the very purpose of making it serviceable.

I am in entire accord with the views of the Judge Advocate General and am of the opinion that in preparing your

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estimates for appropriations you are justified in treating as unserviceable, and exclusive of the eighteen hundred authorized serviceable planes, those in a condition which require general overhauling and repair at the Air Corps depots.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF WAR.

RECEIPT BY VETERAN OF COMPENSATION AND DISABILITY ALLOWANCE

Payment of the disability allowance provided by section 11 of the Act of July 3, 1930, entitled "An Act to amend the World War Veterans' Act, 1924, as amended" (46 Stat. 995), is authorized, even though the recipient of such allowance is now receiving compensation under the Federal Employees' Compensation Act (39 Stat. 742) for the same injury upon which his application for the disability allowance is predicated.

DEPARTMENT OF JUSTICE,

June 1, 1931.

SIR: I have the honor to refer to your letter of April 15, 1931, requesting my opinion whether a veteran of the World War who is receiving compensation under the United States Employees' Compensation Act of September 7, 1916, c. 458, 39 Stat. 742 (U. S. C., title 5, sec. 751 et seq.) may be paid the disability allowance provided in the amendment of July 3, 1930, to section 200 of the World War Veterans' Act of 1924, as amended, c. 849, 46 Stat. 991, 995 (U. S. C., Sup. IV, title 38, sec. 471) for a disability resulting from the same injury for which he is receiving compensation from the United States Employees' Compensation Commission.

In connection with the above request you have submitted, by supplemental letter of May 6, 1931, the case of Simon P. Miller, who enlisted in the military service prior to November 11, 1918, served ninety days or more during the World War, and was honorably discharged on December 4, 1918. Mr. Miller filed his application for disability allow-

ance on November 17, 1930. He was exempt from the payment of a Federal income tax for the year preceding the filing of his application. His application is based upon the same injury for which he is now receiving compensation under the Federal Employees' Compensation Act.

Section 11 of the Act of July 3, 1930, *supra*, entitled "An Act to amend the World War Veterans' Act, 1924, as amended," provides in part:

"That section 200 of the World War Veterans' Act, 1924, as amended (section 471, title 38, U. S. Code), be hereby amended to read as follows:

* * * * *

"On and after the date of the approval of this amendatory Act any honorably discharged ex-service man who entered the service prior to November 11, 1918, and served ninety days or more during the World War, and who is or may hereafter be suffering from a 25 per centum or more permanent disability, as defined by the director, not the result of his own willful misconduct, which was not acquired in the service during the World War, or for which compensation is not payable, shall be entitled to receive a disability allowance at the following rates: 25 per centum permanent disability, \$12 per month; 50 per centum permanent disability, \$18 per month; 75 per centum permanent disability, \$24 per month; total permanent disability, \$40 per month. No disability allowance payable under this paragraph shall commence prior to the date of the passage of this amendatory Act or the date of application therefor, and such application shall be in such form as the director may prescribe: *Provided*, That no disability allowance under this paragraph shall be payable to any person not entitled to exemption from the payment of a Federal income tax for the year preceding the filing of application for such disability allowance under this paragraph. In any case in which the amount of compensation hereafter payable to any person for permanent disability under the provisions of this Act is less than the maximum amount of the disability allowance payable for a corresponding degree of disability under the provisions of this paragraph, then such person may receive such disability allowance in lieu of compensation.

Nothing in this paragraph shall be construed to allow the payment to any person of both a disability allowance and compensation during the same period; and all payments made to any person for a period covered by a new or increased award of disability allowance or compensation shall be deducted from the amount payable under such new or increased award. As used in Titles I and V of the World War Veterans' Act, 1924, as amended, the term "compensation" shall be deemed to include the term "disability allowance" as used in this paragraph."

There is nothing in section 11 of the Act of July 3, 1930, which inhibits the payment to Miller of the disability allowance therein provided because of the fact that he is now receiving compensation under the Federal Employees' Compensation Act by reason of the same injury for which he seeks the disability allowance. While section 11 prevents "the payment to any person of both a disability allowance and compensation during the same period," the word "compensation," because of its context, quite obviously refers to the compensation provided by the World War Veterans' Act. There is nothing in the language or in the purpose of the statute which would warrant the conclusion that the word "compensation" in section 11 was intended to refer to or include compensation payable under the Federal Employees' Compensation Act.

Nor is there anything in the Federal Employees' Compensation Act which prevents the receipt of a disability allowance by Miller while he is receiving compensation under that Act. On the contrary, that statute expressly sanctions this result. Section 7 of that Act (U. S. C., Title 5, Sec. 757) provides:

"That as long as the employee is in receipt of compensation under this Act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States."

Section 7 of the Federal Employees' Compensation Act thus provides expressly that the recipient of compensation under that Act may receive concurrently a pension for military service. The so-called disability allowance provided by section 11 of the amendatory Act of July 3, 1930, is a gratuity to World War veterans who are able to show a certain percentage of permanent disability but who are unable to establish that their disabilities are service connected so as to entitle them to compensation under the World War Veterans' Act. Such a gratuity is a pension in the true sense of the word. See *Walton v. Cotton*, 19 How. 355, 358; *Donnelly v. United States*, 17 C. Cls. 105, 108; 31 Op. 296; 2 Comp. Gen. 582. Although called a disability allowance, the payment provided by section 11 is in all essential respects similar to pensions heretofore granted to Civil War and Spanish War veterans disabled by causes of non-service origin. If any doubt existed, the fact that section 11 of the amendatory Act of July 3, 1930, was intended to provide a disability pension is made clear by the legislative history of the Act. (See Cong. Rec., 71st Cong., 2d sess., pp. 12058-12059, 12061-12063, 12177-12179, 12182.)

My opinion is that payment of the disability allowance provided by section 11 of the Act of July 3, 1930, *supra*, is authorized, even though the recipient of such allowance is now receiving compensation under the Federal Employees' Compensation Act for the same injury upon which his application for the disability allowance is predicated.

Respectfully,

WILLIAM D. MITCHELL.

To the ADMINISTRATOR OF VETERANS' AFFAIRS.

COMPUTATION OF COMMISSIONED STRENGTH OF THE NAVY

In computing the total number of commissioned officers of the active list of the line of the Navy, exclusive of commissioned warrant officers, the Secretary of the Navy is not permitted to apply the four per centum fixed by law as the basis for such computation to the 14,000 enlisted men temporarily authorized for instruction in trade schools, in addition to the number of 137,485 comprising the permanent authorized enlisted strength of 131,485 plus 6,000 apprentice seamen.

DEPARTMENT OF JUSTICE,

June 9, 1931.

SIR: I have the honor to comply with your request of March 18, 1931, for my opinion upon the following question:

"In computing the total authorized number of commissioned officers of the active list of the line of the Navy, exclusive of commissioned warrant officers, should the four per centum fixed by law as the basis for such computation be applied to the 14,000 enlisted men authorized for instruction in trade schools, in addition to the number, 137,485, comprising the permanent authorized enlisted strength of 131,485 plus 6,000 apprentice seamen?"

The Act of August 29, 1916 (c. 417, 39 Stat. 556, 576, U. S. C. Title 34, sec. 2), provided that:

"Hereafter the total number of commissioned officers of the active list of the line of the Navy, exclusive of commissioned warrant officers, shall be four per centum of the total authorized enlisted strength of the active list, exclusive of the Hospital Corps, prisoners undergoing sentence of discharge, enlisted men detailed for duty with the Naval Militia, and the Flying Corps * * *."

In an opinion of September 5, 1922 (33 Op. 311, 315), Attorney General Daugherty advised your predecessor that "the total number of commissioned officers of the active list of the line of the Navy may be computed at the present time upon the basis of the total authorized enlisted strength of 131,485 men as provided in the Act of July 1, 1918." The only question considered at that time was whether the Navy Department should use that figure, or a lower figure representing the average number of enlisted men as provided in the Act of July 1, 1922. In an opinion of May 19, 1930 (36 Op. 233), I advised you that you might lawfully compute the total authorized number of commissioned officers of the active list of the line of the Navy, exclusive of commissioned warrant officers, at four per centum of 137,485, but in determining whether the number of officers thus computed have been commissioned, you might exclude officers designated pursuant to law as additional numbers in grade. It was unnecessary for your purpose at the time the latter opinion was rendered for the Attorney General to express any opinion upon the question whether the four per centum fixed by

law should be applied to the 14,000 enlisted men temporarily authorized by the Act of July 1, 1918, for instruction in trade schools, but this question was referred to as doubtful, and the desirability of clarifying legislation was emphasized. You presented the question which you now ask in your letter of January 16, 1931, and I advised you on February 3, 1931, that while Congress was still in session and an effort was being made to obtain additional legislation, it would serve no good purpose, and perhaps might be improper, for me to attempt to advise you what course to pursue in the event the legislation should not be enacted. The matter was presented to and considered by the Congress, and the following provisions were inserted in the Act of February 28, 1931 (46 Stat. 1431, 1440), making appropriations for the Navy Department:

“Provided, That the appropriation ‘Pay, subsistence, and transportation, Navy, 1931,’ shall be available for the pay and allowances of all officers commissioned in accordance with law, and shall be available to pay one year’s sea pay to surplus graduates of the Naval Academy, as provided by law: Provided further, That the President of the United States, by and with the advice and consent of the Senate, is hereby authorized to appoint as ensigns in the line of the Navy all midshipmen who graduate from the Naval Academy in the year 1931, but if the number so commissioned should exceed the total number of officers of the line of the Navy authorized by existing law, the excess shall be carried in the grade of ensign.”

While these provisions in the Act of February 28, 1931, authorized the President, by and with the advice and consent of the Senate, to commission all graduates of the 1931 class at the Naval Academy as ensigns, so that it would be unnecessary for you to determine the question upon which you ask my opinion, in order to decide whether such graduates could be commissioned, the Act of August 29, 1916, as amended (39 Stat. 556, 577, 41 Stat. 131, 139, U. S. C. Title 34, sec. 7), requires you to make a computation at least once each year to determine the authorized number of officers in the various ranks and grades of the line and of the staff corps. I understand that you propose to make such a computation and that a decision upon the question in regard

to which you ask my opinion is necessary in making such computation.

The provision for 14,000 enlisted men authorized for instruction in trade schools is found in the amendment of July 1, 1918 (40 Stat. 704, 714) of the Act of May 22, 1917 (40 Stat. 84), entitled "An Act to temporarily increase the commissioned and warrant and enlisted strength of the Navy and Marine Corps, and for other purposes." The Act of May 22, 1917, temporarily increased the authorized enlisted strength of the active list of the Navy from 87,000 to 150,000. This legislation was of a purely temporary character, and there was no permanent increase of the enlisted strength of the Navy at that time. The appointment of additional commissioned officers based upon the temporary increases authorized by this statute was, by section 4 of this Act, expressly required to be temporary, and by section 8 of the same Act it was provided that these temporary appointments should continue in force not later than six months after the termination of the war. Thus, in placing the Navy upon a temporary war-time basis, Congress provided for the appointment of officers temporarily commissioned in proportion to the temporary increase in enlisted strength. The Act of May 22, 1917, made no reference to men under instruction in trade schools.

The 14,000 men authorized for instruction in the trade schools are first mentioned in the amendment of section 1 of the Act of May 22, 1917, which is contained in the amendatory Act of July 1, 1918. This Act increased the permanent authorized enlisted strength of the Navy from 87,000 to 131,485, and then amended the temporary increases provided by the Act of May 22, 1916, so as to provide for additional temporary enlistments as follows:

- "That the authorized enlisted strength of the active list of the Navy is hereby temporarily increased from one hundred and thirty-one thousand four hundred and eighty-five to one hundred and eighty-one thousand four hundred and eighty-five; the authorized number of apprentice seamen is hereby temporarily increased from six thousand to twenty-four thousand; and the authorized number of enlisted men of the Flying Corps is hereby temporarily increased from three hundred and fifty to ten thousand: *Provided*, That the

phrase 'authorized enlisted strength,' as applied to the personnel of the Navy, shall mean the total number of enlisted men of the Navy authorized by law, exclusive of the Hospital Corps, apprentice seamen, those sentenced by court-martial to discharge, those detailed for duty with Naval Militia, those furloughed without pay, enlisted men of the Flying Corps, and those under instruction in trade schools: *Provided further*, That the number of enlisted men for instruction in trade schools shall not at any time exceed fourteen thousand, which number is hereby temporarily authorized: *Provided further*, That the President is authorized, at any time during the period of the present war, when in his judgment it becomes necessary, temporarily to increase the authorized enlisted strength of the Navy, as provided for herein, by the addition of fifty thousand men." (40 Stat. 714.)

The Act of July 1, 1918, continued in effect the provisions for temporary appointment of officers based on the temporary increase in enlisted strength. (Sec. 4, as amended, 40 Stat. 715.) Section 8 of the Act of May 22, 1917, providing that such temporary appointments should continue in force not later than six months after the termination of the war, was neither amended nor repealed.

It is entirely clear from the express language of the Act of July 1, 1918, that the instruction of 14,000 men in the trade schools was temporarily authorized. The words of the second proviso, "That the number of enlisted men for instruction in the trade schools shall not at any time exceed fourteen thousand, which number is hereby temporarily authorized," leave no room for any other construction. Under section 4 of the original Act of May 22, 1917, and as amended by the Act of July 1, 1918, only temporary appointments of officers could be predicated upon the temporary increases in enlisted strength. Consequently these 14,000 men by express provisions of both statutes could only be counted as a basis for temporary commissions, which under the provisions of section 8 of the original Act of May 22, 1917, could not continue in force beyond the expiration of six months after the termination of the war. To count these 14,000 men in computing the permanent commissioned strength of the Navy would do violence to these express provisions.

When, in July 1919, Congress dealt with the reduction of the enlisted strength of the Navy to a peace-time basis, the distinction between the temporary increases made during the war and the permanent commissioned strength of the Regular Navy was sharply emphasized, by expressly providing for temporary increases above the permanent enlisted strength of 131,485 during specified periods; that is, for 241,000 men from July 1, 1919, to September 30, 1919; 191,000 men from October 1, 1919, to December 31, 1919; and 170,000 men from January 1, 1920, and expressly providing that these temporary figures should include the men under instruction in trade schools, adding, however, "That nothing herein shall be construed as affecting the permanent, commissioned, or enlisted strength of the Regular Navy as authorized by existing law." (Act of July 11, 1919, c. 9, 41 Stat. 131, 137-138.)

I find nothing in any subsequent statute to qualify the conclusion that the 14,000 men authorized for instruction in the trade schools by the Act of July 1, 1918, being temporarily authorized, can not be counted in computing the permanent commissioned strength of the Navy.

Subsequent to my opinion of May 19, 1930, above referred to, Congress passed the Navy Appropriation Act of June 11, 1930 (46 Stat. 556, 565), which specified the number of line officers of the active list therein provided for as "not to exceed five thousand, four hundred and ninety-nine." Congress thus adopted the conclusions expressed in my opinion of May 19, 1930, and further indicated that the 14,000 men authorized for instruction in the trade schools should be excluded from the computation of commissioned officers. When the Navy Appropriation Act for the succeeding year was under consideration, the House Committee on Appropriations reported a naval appropriation bill (H. R. 16969) which also included specific reference to the number of commissioned officers of the active list of the line as 5,499. In its report this committee said (H. R. 2551, 71st Cong., 3d sess., p. 7) :

"The commissioned line officer strength of the Navy, under the law as construed since 1916, is 4 per cent of the authorized enlisted strength of 131,485 plus 6,000 apprentice seamen. The Navy Department recently has been seeking

to have the Attorney General determine the meaning of the several statutes which together fix the authorized enlisted strength of the Navy, particularly to decide whether or not the authorized number of commissioned line officers should be increased on account of the 14,000 enlisted men temporarily authorized by the act of July 1, 1918, for instruction in trade schools. Such a construction would increase the commissioned line officer strength by 560. The Attorney General has declined to pass upon the question and has taken the sound position, in the judgment of the committee, that the department should look to Congress and not to him for raising the strength, which has been generally understood to be 5,499 since 1916."

The debates in Congress upon this bill show that the provision limiting appropriations to 5,499 line officers on the active list was eliminated so that the graduates of the Naval Academy in the class of 1931 would certainly receive commissions, and also "to permit the Attorney General to interpret the law as already enacted." (Cong. Rec., vol. 74, pp. 4727-4746, 5616, 5618.)

The action of Congress in specifying the number of line officers in the Navy Appropriation Act of June 11, 1930, suggests that Congress did not intend to permit the number of commissioned officers of the active list of the line to be increased by including the 14,000 enlisted men temporarily authorized for instruction in trade schools by the Act of July 1, 1918, in making the computation necessary to determine the total number of commissioned officers of the active list of the line. In view of the discussion which preceded the adoption of the Navy Appropriation Act of February 28, 1931, it is clear that the elimination from that Act of a similar provision specifying the number of officers of the active list of the line did not show an intent on the part of Congress to have the 14,000 trade-school men included in making the computation.

The fact that reference is made to men in trade schools in the various Naval Appropriation Acts is of no significance, for such Acts simply contain convenient classifications and do not show any intention on the part of Congress that by such classifications the number of commissioned officers is to be increased above that authorized by law, or that the

Act of July 1, 1918, temporarily authorizing 14,000 enlisted men for instruction in trade schools was permanent legislation. Such appropriations are only for men actually receiving instruction in trade schools and who would also be covered by the appropriation for enlisted men.

I have considered the Act of March 3, 1931 (46 Stat. 1482), but its provisions do not seem to me to affect the question which you have asked.

In my opinion, in computing the total number of commissioned officers of the active list of the line of the Navy, exclusive of commissioned warrant officers, you are not permitted to apply the four per centum fixed by law as the basis for such computation to the 14,000 enlisted men temporarily authorized for instruction in trade schools, in addition to the number of 137,485 comprising the permanent authorized enlisted strength of 131,485 plus 6,000 apprentice seamen.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE NAVY.

CIVIL SERVICE RETIREMENT ACT—CERTIFICATION

By section 2 of the Act of May 29, 1930 (46 Stat. 469), providing for certification of Government employees for service beyond the retirement age, the responsible officer is required, upon being satisfied that the applicant is physically fit and has been efficient and competent during the two years next preceding his application for continuance in the civil service, to certify to the Civil Service Commission that the continuance of such employee would be advantageous to the public service. This he must do "as of course" upon acceptable proof of the applicant's physical fitness and a showing of his efficiency and competency based upon the information specified in the statute.*

Where the Civil Service Commission approves and certifies the continuance of an employee in the service, it must grant an extension for two years.

DEPARTMENT OF JUSTICE,

June 10, 1931.

SIR: I have the honor to comply with your request of February 10, 1931, for my opinion upon certain questions

*NOTE.—As to the point that the head of the Department must form his own judgment and is not required to make the certificate unless after examination of the employee's whole record he is of the opinion that it is such as to justify his retention, see 35 Op. 159.

propounded by the Civil Service Commission concerning the construction to be placed upon the language of section 2 of the Act of May 29, 1930, c. 349, 46 Stat. 468, 469, providing for certification of employees for service beyond the retirement age. The section reads as follows:

"All employees to whom this Act applies shall, on arriving at retirement age as defined in the preceding section, and having rendered fifteen years of service, be automatically separated from the service, and all salary, pay, or compensation shall cease from that date, and it shall be the duty of the head of each department, branch, or independent office of the Government concerned to notify such employees under his direction of the date of such separation from the service at least sixty days in advance thereof: *Provided*, That if the head of the department, branch, or independent office of the Government in which he is employed certifies to the Civil Service Commission that by reason of his efficiency and willingness to remain in the civil service of the United States the continuance of such employee therein would be advantageous to the public service, such employee may be retained for a term not exceeding two years upon the approval and certification by the Civil Service Commission, and at the end of the two years he may, by similar approval and certification, be continued for an additional term not exceeding two years, and so on: *Provided, however*, That after August 20, 1930, no employee shall be continued in the civil service of the United States beyond the age of retirement for more than four years, except that where the head of the department or establishment certifies, and the Civil Service Commission agrees, that by reason of expert knowledge and special qualifications the continuance of the employee would be advantageous to the public service, further extensions of two years may be granted.

"Whenever an employee shall make application for such continuation in the civil service, and shall submit acceptable proof of his present physical fitness to perform his work, it shall be the duty of the head of the department, branch, or independent office of the Government concerned to obtain from the immediate superior in the service of such

applicant all efficiency ratings and other information on file respecting the character of the work of such applicant, and shall also obtain from such immediate superior his opinion in writing with respect to the efficiency of the work performed by such applicant. From such information shall be eliminated increases in ratings, credits, and other preferences for any cause whatsoever other than the character of work actually performed. Should such information show that the applicant has been efficient and competent during the two years next preceding his application for continuance in the civil service, the head of the department, branch, or independent office of the Government concerned shall, as of course, certify to the United States Civil Service Commission that, by reason of the efficiency and willingness of such applicant to remain in the civil service of the United States, the continuance of such employee would be advantageous to the public service.

"No person separated from the service who is receiving an annuity under the provisions of section 1 of this Act, shall be employed again in any position within the purview of this Act."

The Commission's letter recites the facts in the case of one of its employees who "was given a continuance of two years in 1929," and has now been certified by his immediate superior for a further continuance, and states that there are other pending cases, some of which, I am informed, involve employees of other departments, all of whom have been certified as efficient and desire to remain in the service for four years following arrival at the retirement age. The three following questions are asked:

"1. Does the law require that a department shall, as of course, certify to the Civil Service Commission that the continuance of the employee will be advantageous to the public service?

"2. Does the law require that the Civil Service Commission shall, as of course, approve such continuances, in two-year periods?

"3. If continuances for periods of less than two years may be authorized, does the law require that as many continuances be granted, as of course, as may be necessary

to permit the employee to remain in the service for four years after the retirement age?"

The second paragraph of section 2 provides that when an employee shall make application for such continuance in the service, accompanied by acceptable proof of his physical fitness, it shall be the duty of the head of the department to obtain prescribed information concerning his efficiency and "*should such information show that the applicant has been efficient and competent during the two years next preceding his application for continuance in the civil service, the head of the department * * * shall, as of course, certify to the United States Civil Service Commission that, by reason of the efficiency and willingness of such applicant to remain in the civil service of the United States, the continuance of such employee would be advantageous to the public service.*"

The statute plainly requires the responsible officer, upon being satisfied that the applicant is physically fit and has been efficient and competent during the two years next preceding his application for continuance in the civil service, to certify to the United States Civil Service Commission that the continuance of such employee would be advantageous to the public service. This he must do "as of course" upon acceptable proof of physical fitness and a showing of efficiency and competency based upon the information specified in the statute.

From the form of your second question and the circumstances of the particular case which you have under consideration, I understand the point of your inquiry to be whether the Civil Service Commission, if it approves and certifies the continuance of an employee in the service, must do so for a two-year period or may approve and certify the continuance for a shorter period.

The answer to this question depends upon the interpretation of the provision of section 2 of the Act of May 29, 1930, that "** * * such employee may be retained for a term not exceeding two years * * **," when read with the other provisions of section 2. This same language was contained in the original Retirement Act of 1920. (Act of May 22, 1920, c. 195, 41 Stat. 614.) Examination of the

legislative history of these statutes discloses the purpose of Congress that all extensions of service should be for two years. (Senate Report No. 99, 66th Congress, 1st Sess., p. 5; Congressional Record, Vol. 59, 66th Congress, 2nd Sess., pp. 6316, 6371; H. Rept. 283, 67th Congress, 1st Sess., p. 2; H. Rept. 768, 69th Congress, 1st Sess., pp. 11, 16.) The same language as that now under consideration was continued from the 1920 Act, in the Retirement Act of 1926. (Act of July 3, 1926, c. 801, 44 Stat. 904.) In the debates upon this Bill the periods of extension were consistently referred to as two-year periods. (Congressional Record, 69th Congress, 2nd Sess., pp. 4350, 5219.)

The other provisions of section 2 of the Act of May 29, 1930, show that this is the proper interpretation to be put upon the language under consideration. After providing that the employee may be retained for a term not exceeding two years upon the approval and certification by the Civil Service Commission, Section 2 then provides:

" * * * at the end of the two years he may, by similar approval and certification, be continued for an additional term not exceeding two years, and so on: * * *."

This reference to "the two years" seems to me to show that two years (and no less) was the period of extension contemplated by the reference to a term "not exceeding two years." This is also indicated by the succeeding provision for the limit of such extensions, which is a multiple of two years. I understand that the Civil Service Commission until very recently has so construed the statute, and that, except for a few recent instances, extensions approved by the Civil Service Commission have been for two years, and no less, ever since the enactment of the original Retirement Act of May 22, 1920.

The amendments to the original Retirement Act of 1920, made by the provisions of the Act of July 3, 1926, above mentioned, and substantially continued in the Act of May 29, 1930, provide with particularity the method for granting extensions of Government service beyond the retirement age. For the protection of the civil service against any favoritism in granting such extensions, uniformity of action is required in all cases and the extensions are accordingly required to be the same in all cases. If the statute

left room for the exercise of discretion as to the period of extension it would defeat its own purpose. It seems entirely clear that it does not, and that all extensions must be for two years.

Respectfully,

WILLIAM D. MITCHELL.

To the PRESIDENT.

EMERGENCY ADJUSTED COMPENSATION ACT—LOANS TO
VETERANS ON ADJUSTED SERVICE CERTIFICATES

The Emergency Adjusted Compensation Act, 1931 (46 Stat. 1429), does not authorize the making of loans to veterans on adjusted service certificates which have been in effect less than two years.

DEPARTMENT OF JUSTICE,
June 11, 1931.

SIR: I have the honor to comply with your request of April 4, 1931, for my opinion whether the Emergency Adjusted Compensation Act, 1931 (46 Stat. 1429), should be interpreted as authorizing loans by the Administrator of Veterans' Affairs on adjusted-service certificates which have been in effect less than two years.

The World War Adjusted Compensation Act, as amended (May 19, 1924, c. 157, sec. 501, 43 Stat. 121, 125; March 3, 1927, c. 359, 44 Stat. 1389; March 4, 1929, c. 703, 45 Stat. 1561; U. S. C., Title 38, secs. 641, 642), authorized the issuance to veterans, upon application, of adjusted-service certificates, dated "as of the 1st day of the month in which the application is filed, but in no case before January 1, 1925," and payable in twenty years or upon prior death. Section 502 of the Act, as thus amended, authorized the making of loans upon such certificates, in the following language:

"SEC. 502. (a) A loan may be made to a veteran upon his adjusted-service certificate only in accordance with the provisions of this section.

"(b) Any national bank, or any bank or trust company incorporated under the laws of any State, Territory, possession, or the District of Columbia (hereinafter in this section called 'bank'), is authorized, after the expiration of two years after the date of the certificate, to loan to any

veteran upon his promissory note secured by his adjusted service certificate (with or without the consent of the beneficiary thereof) any amount not in excess of the loan basis (as defined in subdivision (g) of this section) of the certificate. * * *

“(g) The loan basis of any certificate at any time shall, for the purpose of this section, be an amount which is not in excess of 90 per centum of the reserve value of the certificate on the last day of the current certificate year. The reserve value of a certificate on the last day of any certificate year shall be the full reserve required on such certificate, based on an annual level net premium for twenty years and calculated in accordance with the American Experience Table of Mortality and interest at 4 per centum per annum, compounded annually.

“(i) The Director of the United States Veterans' Bureau is authorized, through such officers and at such regional offices, suboffices, and hospitals of the United States Veterans' Bureau as he may designate, and out of the United States Government life insurance fund established by section 17 of the World War Veterans' Act, 1924, as amended, to make loans to veterans upon their adjusted service certificates in the same amounts and upon the same terms and conditions as are applicable in the case of loans made under this section by a bank, and the provisions of this section shall be applicable to such loans; except that the rate of interest shall be 2 per centum per annum more than the rate charged at the date of the loan for the discount of ninety-day commercial paper under section 13 of the Federal Reserve Act by the Federal reserve bank for the Federal reserve district in which is located the regional office, suboffice, or hospital of the United States Veterans' Bureau at which the loan is made, but in no event shall the rate of interest exceed 6 per centum per annum.”

Section 502 was further amended by the Emergency Adjusted Compensation Act, 1931, concerning which you request my opinion, and it reads as follows:

“An Act to increase the loan basis of adjusted service certificates.

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assem-

bled, That section 502 of the World War Adjusted Compensation Act, as amended, is amended by adding at the end thereof two new subdivisions to read as follows:

“(1) For the purpose of this section the loan basis provided in subdivision (g) shall at no time be less than 50 per centum of the face value of the certificate, and in no event shall the rate of interest on any loan made after this subdivision takes effect exceed $4\frac{1}{2}$ per centum per annum, compounded annually. If at the time of application to the Administrator of Veterans' Affairs for a loan the principal and interest on or in respect of any prior loan under this section have not been paid in full by the veteran (whether or not the loan has matured), then, on request of the veteran, the Administrator shall (1) pay or otherwise discharge such unpaid principal and so much of such unpaid interest (accrued or to accrue) as is necessary to make the certificate available for use as security for the new loan and (2) deduct the same from the then existing loan basis of the certificate.

“(m) Loans made by the Administrator of Veterans' Affairs under this section may at his option be made out of the United States Government life insurance fund, or out of the Adjusted Service Certificate Fund created under section 505.’

“SEC. 2. Section 507 of such Act, as amended, is amended to read as follows:

“‘SEC. 507. All amounts in the fund shall be available for payment, by the Administrator, of adjusted service certificates upon their maturity or the prior death of the veteran, for payments under section 502 to banks on account of notes of veterans, and for making loans authorized by section 502, as amended.’

“SEC. 3. There is authorized to be appropriated such amounts as may be necessary to provide for the making of loans to veterans by the Administrator of Veterans' Affairs under the World War Adjusted Compensation Act, as amended.

“SEC. 4. This Act may be cited as the ‘Emergency Adjusted Compensation Act, 1931.’”

Thus, prior to the 1931 amendment, section 502 provided that loans should be made “only in accordance with the

provisions of this section "; that a bank or trust company might make such loans only "after the expiration of two years after the date of the certificate "; that the Director of the United States Veterans' Bureau was authorized to make loans "in the same amounts and upon the same terms and conditions as are applicable in the case of loans made under this section by a bank "; and that "the provisions of, this section shall be applicable to such loans " when made by the Director. The plain meaning of these provisions was that the Director, as well as the banks, was authorized to make loans only "after the expiration of two years after the date of the certificate," and this, I am informed, has been the view of the Director, uniformly followed since the statute was first enacted.

Various veterans who delayed making their applications and therefore hold certificates less than two years old have applied to the Administrator for loans. The Administrator has rejected certain applications on the ground that he was not authorized to make loans except on certificates which had been issued for at least two years and proposes to reject all similar applications upon the same ground. In my view this action was based upon a correct interpretation of the law.

While it is provided that the latter Act "may be cited as the 'Emergency Adjusted Compensation Act, 1931,'" it is entitled, "An Act to increase the loan basis of adjusted service certificates," and expressly provides for *amendment* of the World War Adjusted Compensation Act to accomplish that purpose, simply increasing the "loan basis" in that Act from ninety per centum of the reserve value to fifty per centum of the face value of the certificates, and, does not, by its own terms, authorize any loans whatever. The appropriation which it provides is expressly stated to be "for the making of loans to veterans * * * under the World War Adjusted Compensation Act, as amended." Loans were authorized under that Act only "after the expiration of two years after the date of the certificate" and the 1931 Act does not purport to remove that restriction.

When the provisions of a statute are clear and unambiguous there is ordinarily no occasion to resort to its legis-

lative history as an aid to interpretation. If, however, the legislative background of the Emergency Adjusted Compensation Act of 1931 is examined, it is clear that there was no intention on the part of Congress to remove or abbreviate the two-year requirement contained in the earlier statute. It was pointed out in the House and in the Senate that the World War Adjusted Compensation Act authorized loans only on certificates at least two years old and that the pending bill would effect no change in this respect. Some members contended that the restriction ought to be eliminated, but it was recognized that the bill did not affect it. (Cong. Rec., vol. 74, pp. 4838, 5077, 5140-5141, 5375.) Referring to the 1931 Act, the President, in a message to Congress, pointed out that "there are 100,000 veterans whose certificates have been issued recently who under the proposed law will have no loan privilege until their certificates are 2 years old." (Cong. Rec., vol. 74, p. 6168.) After the bill had become law efforts were made in Congress to eliminate the two-year requirement by separate enactment, but without success. (Cong. Rec., vol. 74, pp. 6596, 6969, 6972, 7108.)

It is therefore my opinion that the Emergency Adjusted Compensation Act, 1931, does not authorize the making of loans on adjusted service certificates which have been in effect less than two years.

Respectfully,

WILLIAM D. MITCHELL.

To the ADMINISTRATOR OF VETERANS' AFFAIRS.

PENSION CLAIM OF JEANETTE BURDICK

Bernie Burdick, a Sergeant Major in the United States Marine Corps, was verbally authorized by the Brigade Commander to visit the Marine Barracks at Cape Haitien. He was directed to leave Port au Prince on April 8, 1929, by a Government-owned truck carrying supplies to Cape Haitien, and to return to Port au Prince the next day by the same means of transportation. While en route to the Marine Barracks at Cape Haitien, the Government-owned truck in which Burdick was riding, and of which he was in charge by reason of a provision of his Brigade's Manual placing the senior in rank in charge of a motor vehicle engaged in official business, became uncontrollable, due to trouble with the steering gear, and plunged

down the mountainside, thereby causing injuries to Burdick which resulted in his death. *Held*, under the circumstances herein stated, that Burdick lost his life "in the line of duty" and under such circumstances as to comply with sections 4693 and 4694 of the Revised Statutes; and that his widow, Jeanette Burdick, is entitled to a pension under section 4702 of the Revised Statutes, as amended by section 1 of the Act of August 7, 1882 (22 Stat. 345.)

DEPARTMENT OF JUSTICE,

June 12, 1931.

SIR: I have the honor to comply with your request of November 15, 1930, for my opinion whether one Bernie Burdick, late a Sergeant Major in the United State Marine Corps, lost his life in the line of duty and under such circumstances as to entitle his widow, Mrs. Jeanette Burdick, to a pension.

The following facts appear from your letter and enclosures:

Prior to his death Burdick was stationed with the First Brigade of the Marine Corps, at Port au Prince, Haiti. He was verbally authorized by the Brigade Commander to visit the Marine Barracks at Cape Haitien, to leave Port au Prince by a Government-owned truck at or about 6 a. m., April 8, 1929, and to return to Port au Prince by the same means of transportation on April 9, 1929. A Corporal of the Marine Corps was directed by the motor transport officer to take charge of a convoy of two Government-owned trucks carrying supplies to Cape Haitien. The trucks left Port au Prince for Cape Haitien, a distance of more than one hundred miles, on the morning of April 8th. The road is through a mountainous country, and the trip ordinarily requires about six hours. The Corporal was driving the forward truck with a private riding beside him. Burdick was riding upon the rear truck, which was being driven by a private, and which was about two hundred and fifty yards behind the forward truck. About 11.30 a. m., while the convoy was ascending a mountain, the driver of the rear truck lost control of it because of trouble with the steering gear, whereupon the truck left the road and plunged down the mountainside. Burdick received injuries which resulted in his death on the afternoon of the same day.

Marine Corps authorities have found that Burdick was injured in the line of duty, such finding being based (1)

upon the fact that although Burdick had been granted verbal leave of a short duration to visit the Marine Barracks at Cape Haitien, nevertheless at the time of the accident he was, at the express direction of the Brigade Commander, riding on a Government-owned truck which was pursuing official duty in transporting supplies to the Marine Barracks at Cape Haitien, (2) upon the fact that the accident happened without fault on his part, and (3) upon Chapter IV, section 4, paragraph 9, of the Manual of the First Brigade of the Marine Corps, which provides, in part, that—

“The senior in rank of those traveling on a motor vehicle is in charge of that vehicle.”

I am advised by the Navy Department that each Brigade of the Marine Corps has its own Manual, that the above provision of the First Brigade's Manual places the senior in rank in charge of a motor vehicle en route on official business even though such senior is on furlough, and subjects him to Marine Corps discipline in the event he fails to perform that duty. Under these regulations Burdick at the time of the accident was in charge of the Government truck in which he was riding.

Section 4692 of the Revised Statutes (U. S. C., Title 38, section 151) provides that the persons specified in section 4693 of the Revised Statutes who are disabled under conditions therein stated shall, upon application, be entitled to receive a pension during the existence of such disability. Section 4693 (U. S. C., Title 38, section 152), so far as material here, provides:

“The persons entitled as beneficiaries under the preceding section are as follows:

“First. Any officer * * *, or any enlisted man, however employed, in the military or naval service of the United States, or in its Marine Corps, whether regularly mustered or not, disabled by reason of any wound or injury received or disease contracted, while in the service of the United States and in the line of duty.”

* * * * *

Section 4702 of the Revised Statutes, as amended by section 1 of the Act of August 7, 1882, c. 438, 22 Stat. 345 (U. S. C., Title 38, Sec. 191) provides that if any person within the provisions of sections 4692 and 4693, R. S., shall

die by reason of any injury "which under the conditions and limitations of such sections would have entitled him to an invalid pension had he been disabled," his widow shall receive a pension.

The meaning of the phrase "in the line of duty" in section 4693 was recently considered by Acting Attorney General Hughes in an opinion dated January 6, 1930 (36 Op. 156, 158), involving the pension claim of Sidney Floyd Love. In that opinion it was held that Love, an enlisted man in the Navy, who was injured at 6 p. m. while returning to his post of duty on his own motor cycle, from a liberty granted to him from 1 p. m. to 8.30 p. m., was injured in the line of duty. Acting Attorney General Hughes there quoted with approval the following statement from 32 Op. 12, wherein Attorney General Palmer considered the meaning of the words "in the line of duty" in the War Risk Insurance Act.

" * * * The mere fact that an injury or disease is coincident in time with service is not sufficient to class it as suffered or contracted 'in the line of duty.' It must have been caused by the presence of its victim in the line of duty when it was received or contracted. But the relation of causation is sufficiently shown when it appears that the victim was at a place and doing what was required or permitted by his duty as a soldier, and that, between his presence and conduct and the injury or disease, no adequate and sufficient cause, for which he is responsible, intervened. This, I think, is the true meaning of the criterion laid down by Mr. Cushing * * * (7 Op. 149, 162)."

Since at the time of the injury which caused his death Burdick was riding upon and in charge of a Marine truck engaged in official business, I am of the opinion that he lost his life in the line of duty within the meaning of the above definition and the opinion in the Love case. Accordingly, as far as sections 4692 and 4693 of the Revised Statutes are concerned, the right of Burdick's widow to a pension seems clear. Those sections, however, must be read in connection with section 4694, R. S. (U. S. C., Title 38, section 155), which provides:

"No person shall be entitled to a pension by reason of wounds or injury received or disease contracted in the serv-

ice of the United States subsequent to the twenty-seventh day of July, eighteen hundred and sixty-eight, unless the person who was wounded, or injured, or contracted the disease was in the line of duty; and, if in the military service, was at the time actually in the field, or on the march, or at some post, fort, or garrison; or en route, by direction of competent authority, to some post, fort, or garrison; or if in the naval service, was at the time borne on the books of some ship or other vessel of the United States, at sea or in harbor, actually in commission, or was at some naval station, or on his way, by direction of competent authority, to the United States, or to some other vessel or naval station, or hospital."

As a member of the Marine Corps stationed in Haiti, it is patent that Burdick was either "in the military service" or "in the naval service," within the meaning of section 4694. See the Act of June 12, 1916, c. 140, 39 Stat. 224 (U. S. C., Title 34, Sec. 445); section 1621, R. S., as amended by the Act of June 4, 1920, c. 227, 41 Stat. 787 (U. S. C., Title 34, sec. 715). At the time of the injury which caused his death he was en route, "by direction of competent authority," to a place at which armed forces of the United States were quartered and maintained. Unquestionably, the Marine Barracks at Cape Haitien is a "post, fort, or garrison" within the meaning of section 4694 if the forces there maintained be considered as "in the military service." On the other hand, if such forces be considered as "in the naval service," the Marine Barracks at Cape Haitien clearly fall within the term "naval station," as used in section 4694. See *United States v. Phisterer*, 94 U. S. 219, 222; *Caldwell's Case*, 19 Wall. 264, 268; *McGowan v. United States*, 48 C. Cls. 95, 98.

In my opinion Sergeant Major Burdick lost his life "in the line of duty" and under such circumstances as to comply with sections 4693 and 4694 of the Revised Statutes. Accordingly, his widow is entitled to a pension under section 4702 of the Revised Statutes, as amended by section 1 of the Act of August 7, 1882.

Respectfully,

WILLIAM D. MITCHELL.

To the ADMINISTRATOR OF VETERANS' AFFAIRS.

SATURDAY HALF HOLIDAY LAW—FIELD EMPLOYEES OF
THE NAVY DEPARTMENT

Under the Act of March 3, 1931, providing for Saturday half holidays for certain Government employees (46 Stat. 1482), Saturday should be counted as four hours when computing the annual leave provided by the Act of August 29, 1916 (39 Stat. 617), for employees in the field service of the Navy Department.

DEPARTMENT OF JUSTICE,

June 25, 1931.

Sir: I have the honor to comply with your request of March 27, 1931, as amended by your letter of March 31, 1931, for my opinion whether or not Saturdays shall be counted as full days when computing annual leave for employees in the field service of the Navy Department. These employees come within the provision of the Act of March 3, 1931 (46 Stat. 1482), that "four hours, exclusive of time for luncheon, shall constitute a day's work on Saturdays * * * for all civil employees of the Federal Government," with stated exceptions not here pertinent. Their leave, however, is not governed by the other general statutes considered in the opinion to the President of March 17, 1931. (36 Op. 407.)

Annual leave for employees in the field service of the Navy Department is provided by the Act of August 29, 1916, c. 417, 39 Stat. 556, 617 (U. S. C., Title 34, sec. 511), which reads in part as follows:

"That each and every employee of the navy yards, gun factories, naval stations, and arsenals of the United States Government is hereby granted thirty days' leave of absence each year, without forfeiture of pay during such leave: *Provided further*, That it shall be lawful to allow pro rata leave only to those serving twelve consecutive months or more: *And provided further*, That in all cases the heads of divisions shall have discretion as to the time when the leave can best be allowed: *And provided further*, That not more than thirty days' leave with pay shall be allowed any such employee in one year: *Provided further*, That this provision shall not be construed to deprive employees of any sick leave or legal holidays to which they may now be entitled under existing law."

An earlier Act, approved February 1, 1901, c. 190, 31 Stat. 746, had provided for these employees "fifteen working days' leave of absence each year." Although the 1916 Act did not specify *working* days, it has always been interpreted as increasing the amount of annual leave from fifteen working days to thirty working days; and it was expressly provided in the Act that it "shall not be construed to deprive employees of any sick leave or legal holidays to which they may now be entitled under existing law."

It has been suggested that the proviso in the Act of August 29, to the effect "That this provision shall not be construed to deprive employees of any sick leave or legal holidays to which they may now be entitled under existing law" only saved to the employee, in addition to his annual leave, those legal holidays which had been established by law in force when the Act of 1916 was passed, and not holidays established by law since 1916.

There is no rational ground for believing that the Congress intended to make a distinction, in computing annual leave, between holidays created by law before the Act of 1916 was passed and those created afterwards. The proviso may fairly be construed to mean merely that any existing law providing for not counting holidays as part of the leave period, should remain unaffected. So construed, holidays created after 1916, as well as those created before, would be treated alike.

The effect, therefore, was to authorize for the field employees the same amount of leave which the statutes considered in the opinion of March 17 had granted to other employees of the Government, that is, "thirty days * * * exclusive of Sundays and legal holidays," and no reason appears for considering that the holidays to be excluded under one Act differ from the holidays to be excluded under the other.

It appears that heretofore the field employees of the Navy Department were charged with a full day toward annual leave for absence on Saturday during the summer months when Executive orders prescribed only four hours of labor, the practice in this respect forming an exception to that followed in other services of the Government. The documents submitted with your letter indicate that such

practice was based upon a view that the field employees were entitled to have excluded from their annual leave only *legal* holidays and that the holiday granted by Executive order on Saturday afternoon was not a legal holiday. It is unnecessary to consider the correctness of that conclusion and the practice based thereon. As pointed out in the opinion of March 17, Saturday afternoon is now to be considered a legal holiday within the purview of the general leave Act construed in that opinion, and I must conclude that it is likewise to be considered a legal holiday for the purposes of the Act of August 29, 1916.

It is therefore my opinion that Saturday should be counted as four hours when computing the annual leave provided by the Act of August 29, 1916, for employees in the field service of the Navy Department.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE NAVY.

CITIZENSHIP OF WIFE AND MINOR CHILD OF
PIETRO MARIANI.

Pietro Mariani, a native of Italy, was regularly admitted to the United States in 1913 and was naturalized in 1919. Within five years after his naturalization he went to Italy with an American passport. While there he married, in 1921, and a child was born in 1923. Because of his long absence from the United States, his certificate of naturalization was canceled under section 15 of the Naturalization Act of June 29, 1906 (34 Stat. 601). In 1926 Mariani returned to the United States as an alien under the provisions of the Act of May 26, 1926 (44 Stat. 654), extending naturalization privileges to certain alien veterans of the World War, and he was naturalized again in 1929. *Held*, under the circumstances herein stated, that the wife of Mariani and his child born in Italy in 1923 are not citizens of the United States.

DEPARTMENT OF JUSTICE,

July 16, 1931.

SIR: Response to your request of July 10, 1930, for my opinion with respect to the citizenship of the wife and a minor child of Pietro Mariani was postponed because of the possibility of a judicial determination of the point at issue in a pending case. Since that case has now been de-

cided without an adjudication of the question presented by you, I now have the honor to reply to your inquiry.

The facts appear from your letter and papers in the file accompanying it to be as follows:

Pietro Mariani is a native of Italy who was regularly admitted to the United States on or about June 17, 1913. On September 22, 1919, he was naturalized by the Circuit Court of Multnomah County, Oregon. Within five years after his naturalization he went to Italy with an American passport. While there he married, in 1921, and a child was born in 1923. He remained in Italy for several years. Because of his long absence from the United States, proceedings were instituted to cancel his naturalization in accordance with the provisions of section 15 of the Naturalization Act of June 29, 1906, c. 3592, 34 Stat. 601 (U. S. C., Title 8, sec. 405), and the certificate was cancelled by the United States District Court for the District of Oregon on August 19, 1925. In 1926 Mariani returned to the United States as an alien under the provisions of the World War Veterans' Act of May 26, 1926, c. 398, 44 Stat. 654 (U. S. C., Title 8, secs. 241-246, 392a), which allowed the readmission to the United States of certain aliens who had been in the military forces of the United States. He was naturalized again on November 21, 1929. On January 9, 1930, he filed with the Department of Labor a petition for the issuance of nonquota immigration visas for his wife and child in Italy in accordance with the provisions of sections 4 (a) and 9 of the Immigration Act of May 26, 1924, 43 Stat. 155, 157 (U. S. C., Title 8, secs. 204, 209).

Your Department declined to issue such visas, believing that the wife and child still are citizens of the United States; but the Department of State declines to issue passports to them, as it takes the view that, on account of the cancellation of the certificate of naturalization of Mariani, his wife and child cannot be regarded as citizens of the United States.

If the first certificate of naturalization had remained in effect, the wife would be a citizen of the United States by virtue of section 1994, Revised Statutes, which was in effect at the time of her marriage to Mariani and which provided:

"Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

But this section was repealed by section 6 of the Act of September 22, 1922, commonly known as the "Cable Act," c. 411, 42 Stat. 1022 (U. S. C., Title 8, sec. 10), and the second naturalization of Mariani, which occurred since the passage of the Cable Act, consequently does not affect the citizenship of his wife.

The claim of citizenship for the child is based upon section 1993, Revised Statutes (U. S. C., Title 8, sec. 6), which has never been repealed and which provides:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; * * *."

The question is whether the cancellation of Mariani's first certificate of naturalization under section 15 of the Naturalization Act of 1906 affects the status of his wife and child, it being clear that they would be entitled in this country to the rights of citizens of the United States were it not for the cancellation. This section, 34 Stat. 601 (U. S. C., Title 8, sec. 405), provides in part as follows:

"If any alien who shall have secured a certificate of citizenship under the provisions of this Act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, * * *."

The constitutionality of the provision just quoted has been upheld in *Johannessen v. United States*, 225 U. S. 227, and *Luria v. United States*, 231 U. S. 9. In the latter case the Court said of this provision (231 U. S. at p. 24):

"It does not make any act fraudulent or illegal that was honest and legal when done, imposes no penalties, and at most provides for the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship, to which their possessors never were lawfully entitled."

This indicates that if the certificate is cancelled it must be regarded as a nullity.

The Naturalization Act of 1906 makes no provision for a wife or child of a person whose certificate is cancelled under this provision. And nothing in section 1993 or section 1994 of the Revised Statutes, which are quoted above, seems to me to require that an alien, whose only claim to citizenship is derived through naturalization which has been improvidently granted and annulled as fraudulently procured, should continue to enjoy the privileges of citizenship. It would be especially anomalous for persons who, like the woman and child involved in this case, have never resided in the United States to be citizens, although the person from whom they derived their rights is regarded as never having been a citizen.

Owing to the dearth of direct authority on the point, I have made careful examination of the various unreported cases which are referred to in the opinions, memoranda, and files which you submitted to me. None of them contains any real discussion of the point. It is true that they do give some slight support to the claim of citizenship of the wife and child, but countervailing inferences can be drawn from other cases.

None of the cases in the Supreme Court dealing with Government land grants to which I am referred, such as *United States v. Detroit Lumber Company*, 200 U. S. 321, enunciates any principle which seems applicable to the present situation. Although the Supreme Court has recognized that there is a certain analogy between a grant of citizenship through naturalization and a Federal land grant, I do not believe that the analogy extends so far as to afford to a wife or child of an alien who has fraudulently obtained naturalization papers the same protection which equity has given to *bona fide* purchasers of land for which Federal grants had been fraudulently obtained.

I conclude that the wife of Mariani and his child born in Italy in 1923 are not citizens of the United States.

Respectfully,

WILLIAM D. MITCHELL.

TO THE SECRETARY OF LABOR.

ESTABLISHMENT OF BRANCH BY NATIONAL BANKING
ASSOCIATION

The Comptroller of the Currency is without authority to approve the application of the Live Stock National Bank of Sioux City, Iowa, to establish a branch in Sioux City, because the law of Iowa does not permit a State bank to establish a branch or office in that city.

DEPARTMENT OF JUSTICE,

July 29, 1931.

SIR: I have the honor to acknowledge receipt of your letter of June 26, 1931, stating that the Comptroller of the Currency has received an application from the Live Stock National Bank of Sioux City, Iowa, for permission to establish a branch within the corporate limits of that city. My opinion is requested as to whether or not the Comptroller may lawfully approve the application.

The law permitting the establishment of branch banks by national banking associations is contained in the Act of February 25, 1927, c. 191, sec. 7, 44 Stat. 1224, 1228, which amends section 5155 of the Revised Statutes of the United States to read in part as follows:

"SEC. 5155. The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * * * *

"(c) A national banking association may, after the date of the approval of this Act, establish and operate new branches within the limits of the city, town, or village in which said association is situated if such establishment and operation are at the time permitted to State banks by the law of the State in question.

* * * * *

"(e) No branch of any national banking association shall be established or moved from one location to another with-

out first obtaining the consent and approval of the Comptroller of the Currency.

“(f) The term ‘branch’ as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.”

Under these provisions, one of the conditions precedent to the establishment of a branch bank by a national banking association is that “such establishment and operation are at the time permitted to State banks by the law of the State in question.”

The applicable law of Iowa is the Act approved March 13, 1931 (c. 203, Laws of the Forty-fourth General Assembly of the State of Iowa), which became effective March 19, 1931, and provides:

“SECTION 1. That section ninety-two hundred fifty-eight-b one (9258-b1) of the code, 1927, be repealed and the following enacted in lieu thereof:

“‘9258-b1. No banking institution shall open or maintain any branch bank. However, as may be authorized by and subject to the jurisdiction of the banking department any banking institution may establish an office for the sole and only purpose of receiving deposits and paying checks and performing such other clerical and routine duties not inconsistent with this act. No banking institution may establish any office beyond those counties contiguous to the county in which said banking institution is located nor in a city or town in which there is already an established banking institution. No office shall be continued at any place after a banking institution has actually commenced business at that place. Nothing in this act shall prohibit national banks the privileges of this section whenever they may be so authorized by federal law.’”

The first sentence of this Act in terms prohibits the establishment by State banks of a branch anywhere within the State. Although a later sentence authorizes the establishment of “an office for the * * * purpose of receiving deposits and paying checks” (which would seem to come within the meaning of the term “branch” as used in the

provisions of the Act of Congress of February 25, 1927, quoted above), this permission granted by the Iowa Act is limited by the provision that "No banking institution may establish any office * * * in a city or town in which there is already an established banking institution." There are, of course, such established banking institutions in Sioux City.

It consequently appears that a State bank could not establish a branch or an office of the type referred to in the Iowa Act of March 13, 1931, in Sioux City.

I am, therefore, of the opinion that the Comptroller of the Currency is without authority to approve the application of the Live Stock National Bank of Sioux City, Iowa, to establish a branch in that city.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE TREASURY.

PORTO RICO—VALIDITY OF BOND ISSUE

The proposed issue for the Government of Porto Rico of bonds in the sum of \$500,000, the proceeds from the sale of which are to be devoted to the continuance of the construction of works for development and use of the waters of the Toro Negro and Matrullas Rivers, being authorized by Congress and by Act No. 7 of the Legislature of Porto Rico of April 6, 1931, and all the statutory requirements regarding the issue and sale of these bonds having been complied with, said bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of the people of Porto Rico.

DEPARTMENT OF JUSTICE,

August 19, 1931.

SIR: I have the honor to refer to your letter of July 30, 1931, stating that your Department has been authorized to sell for the account of the Government of Porto Rico bonds of the face value of \$500,000, the proceeds from which are to be devoted to the continuance of the construction of works for development and use of the waters of the Toro Negro and Matrullas Rivers under the so-called Toro Negro project.

The proposed bonds are to be issued under authority contained in section 3 of the Act of Congress approved March

2, 1917, entitled "An Act to provide a civil government for Porto Rico and for other purposes," as amended by the Act of March 4, 1927 (c. 145, 39 Stat. 951, 953; c. 503, 44 Stat. 1418; U. S. C., title 48, secs. 741, 745), and Act No. 7 of the Twelfth Legislative Assembly of Porto Rico, third session, approved April 6, 1931, a copy of which was enclosed with your letter.

You state that the bonds are to be issued and sold by you at the request of the Treasurer of Porto Rico (which request has been approved by the Governor), in coupon form, in the denomination of \$1,000 each, to be dated January 1, 1931, and to bear interest at the rate of $4\frac{1}{4}$ per centum per annum, payable semiannually on January 1 and July 1 of each year, the principal thereof to be payable at the Treasury of the United States on January 1, 1951, and the bonds to be redeemable at par, with accrued interest, on January 1, 1941, or on any interest payment date thereafter. A copy of the form of the proposed bond is submitted with your letter and you request my opinion upon the legality of the issue.

Section 3 of the Act of March 2, 1917, as amended provides:

"* * * and when necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Porto Rico or any municipal government therein as may be provided by law, and to protect the public credit: *Provided, however,* That no public indebtedness of Porto Rico and the municipalities of San Juan and Ponce shall be allowed in excess of 10 per centum of the aggregate tax valuation of its property * * *. In computing the indebtedness of the people of Porto Rico, municipal bonds for the payment of interest and principal of which the good faith of the people of Porto Rico has heretofore been pledged and bonds issued by the people of Porto Rico secured by bonds to an equivalent amount of bonds of municipal corporations or school boards of Porto Rico shall not be counted, but all bonds hereafter issued by any municipality or subdivision * * * for which the good faith of the people of Porto Rico is pledged shall be counted."

You state that the records of your Department show that the aggregate assessed valuation of real and personal prop-

erty in Porto Rico on December 31, 1930, amounted to \$326,144,346; that on the said date there were outstanding bonds of the Government of Porto Rico of the face value of \$29,103,000; that the total amount of temporary loans outstanding was \$766,494.54; and that since the amendatory Act of March 4, 1927, the good faith of the people of Porto Rico has been pledged to the payment of principal and interest on municipal bonds aggregating \$1,361,500, which must be added to the foregoing, thus making a total of \$31,230,994.54, to be considered when ascertaining the total bonded indebtedness which the Government of Porto Rico is authorized to incur. Therefore, it is apparent that the proposed issue will not increase the bonded indebtedness beyond 10 per centum of the aggregate of the assessed valuation, the maximum permitted by law.

Section 1 of the Act of April 6, 1931, reads in part as follows:

“That the Treasurer of Porto Rico is hereby authorized, empowered and directed to issue bonds of The People of Porto Rico up to the sum of one million dollars (\$1,000,000.00), pursuant to the terms hereinafter set forth. The proceeds from the said issue of bonds of one million dollars (\$1,000,000.00) shall be covered into the Treasury of Porto Rico in the fund created by the ‘Act for the Development of the Water Resources,’ approved April 29, 1927, and known as ‘Special Fund for the Development and Use of the Water Power,’ and shall be applied by the Commissioner of the Interior to the construction of the works of the Toro Negro Hydro-electric Project; including the completion of the Cuineo Dam and the diversion of the waters of the Matrullas River for the generation of electric power at the Torro Negro-Hydro-electric Plant; *Provided*, that this bond issue shall be made and sold as the work progresses, in partial amounts of one hundred thousand dollars (\$100,000.00), or such multiples thereof, as according to the estimate of the Commissioner of the Interior, shall be required to take care of the expenditures of construction, so that the progress of the work may continue without interruption * * *.”

Section 2 of said Act provides that the bonds may be in coupon form of the denomination of \$1,000 or registered

form of the denomination of \$5,000, or both, shall bear interest at a rate not exceeding $4\frac{1}{2}$ per centum per annum, payable semiannually on the first day of January and July, and shall be redeemable within twenty years from the date of issue, but reserving to the Government of Porto Rico the option and the right to redeem all or any of the said bonds at par, with accrued interest, on any interest payment date after the first ten years from the date of issue upon giving notice as prescribed by the Act, both principal and interest to be payable in Porto Rico, at the office of the Treasurer of Porto Rico, or at the Treasury of the United States, in gold coin of the United States of the present standard of weight and fineness.

Section 3 of said Act provides that the bonds may be sold by the Secretary of War of the United States, or by the Treasurer of Porto Rico, or by any fiscal agent appointed for the purpose by the Treasurer of Porto Rico, with the approval of the Governor, on terms most advantageous to the people of Porto Rico and as near the date of issue as possible; and that the Treasurer with the approval of the Governor, under the limitations prescribed therein, shall have absolute intervention and authority in all matters connected with the said bonds, including the terms and denominations thereof, and the manner, time, and method of their issue and sale. The Treasurer is authorized and directed to pay the principal and interest when due and an amortization fund for the redemption of the bonds is provided. For the payment of both principal and interest the good faith of the people of Porto Rico is irrevocably pledged.

There was transmitted with your letter a statement signed by the Commissioner of the Interior of Porto Rico, setting forth his estimate that a total amount of \$500,000 will be required in order to continue until March 31, 1932, the projects for which the bond issue is provided, and also a statement signed by the Treasurer, setting forth his determinations in those matters left to his discretion, and this has been approved by the Governor in accordance with the Act of the Legislature.

I find that all the statutory requirements regarding the issue and sale of the said bonds have been complied with and

that the form of bond submitted is in conformity with the law and the determinations of the Treasurer, approved by the Governor. The form of bond properly recites that "under the provisions of section 3 of the Act of Congress, approved March 2, 1917, as amended by the Act of March 4, 1927, this bond is exempt from taxation by the Government of the United States, or by the Government of Porto Rico or of any political or municipal subdivision thereof, or by any State, Territory, or possession, or by any county, municipality, or other municipal subdivision of any State, Territory, or possession of the United States, or by the District of Columbia."

It is therefore my opinion that the bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of the People of Porto Rico.

Respectfully,

JOHN LORD O'BRIAN,

ACTING ATTORNEY GENERAL.

To the SECRETARY OF WAR.

VETERANS' ADMINISTRATION—ADJUDICATION OF DIS-
PUTED CLAIMS FOR INSURANCE BENEFITS

The Administrator of Veterans' Affairs has authority under the World War Veterans' Act, 1924, as amended by the Act of July 3, 1930 (46 Stat. 991), and the Consolidation Act of July 3, 1930 (46 Stat. 1016), creating the Veterans' Administration, in accordance with the proposed regulation submitted by him, to confer power on the Insurance Claims Council to effect a disagreement as required by section 19 of the amendatory Act in cases where no appeal is taken to the Administrator, under such regulations as he may promulgate to govern the procedure and action of that Council; and in cases in which an appeal is taken by the claimant from an adverse decision by such Council, the Administrator has authority to delegate to the Solicitor of the Veterans' Administration the power to act in the name of the Administrator.

DEPARTMENT OF JUSTICE,

September 14, 1931.

SIR: I have the honor to reply to your letter of August 21, 1931, requesting my opinion on whether the decision of rejection of a claim for insurance by the Insurance Claims

Council of the Veterans' Administration unappealed from will constitute a disagreement under section 19 of the World War Veterans' Act, and whether, in cases in which claims are denied by the Insurance Claims Council and an appeal is taken by the claimant from that decision, you may delegate to the Solicitor of the Veterans' Administration authority to take final action for you and such action by the Solicitor constitutes a disagreement as required by section 19 of the Act, in the event a proposed regulation, accompanying your letter, is promulgated. That proposed regulation provides:

"1000. ESTABLISHMENT OF INSURANCE CLAIMS COUNCIL.—There is hereby established in the office of the Assistant Administrator in Charge of Finance and Insurance an Insurance Claims Council * * *.

"A. *Duties and functions.*—The Insurance Claims Council is vested with the exclusive authority to render original decisions on all claims for permanent and total benefits for insurance, * * *.

"B. Where the Insurance Claims Council finds permanent and total disability to exist, such decision shall show the effective date thereof and in case of Government Life Insurance, the decision shall show the date of receipt of due proof. The case will be adjudicated on the basis of such decision.

"C. Where the Insurance Claims Council finds that permanent total disability does not exist as alleged, such denial shall be final except as hereinafter provided, and a letter so advising the claimant will be concurrently prepared and sent to the claimant at his last address of record. Said letter will advise the claimant the date on which the Council denied the claim, and that the claimant may elect to consider such denial final for purposes of instituting suit under Section 19 of the World War Veterans' Act, 1924, as amended, or may appeal personally, or through his duly authorized representative, to the Administrator of Veterans' Affairs, provided such appeal is made within sixty days from the date of receipt of notice denying the claim. Said letter should further advise the claimant that if he elects to accept the denial of the claim by the Council as final, the statute of limitations applicable to suits under Section 19 shall com-

mence to run from and after his receipt of the notice of denial of the claim.

"If an appeal is filed it shall be forwarded to the Administrator, through the Assistant Administrator in Charge of Finance and Insurance, who shall at the time of forwarding the same indicate his approval or disapproval of the decision of the Insurance Claims Council, from which appeal is taken. If no appeal is filed within the time fixed herein, allowing reasonable time for delivery of mail, the case folder shall be forwarded to the appropriate office or station."

The power to make rules and regulations under the World War Veterans' Act is contained in section 5, as amended by the Act of July 3, 1930, c. 849, 46 Stat. 991 (U. S. C., Supp. IV, Title 38, sec. 426), which provides:

"The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act; and all decisions of question of fact and law affecting any claimant to the benefits of Titles II, III, or IV of this Act shall be conclusive except as otherwise provided herein. All officers and employees of the bureau shall perform such duties as may be assigned them by the director. All official acts performed by such officers or employees specially designated therefor by the director shall have the same force and effect as though performed by the director in person. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of compensation, insurance, vocational training, or maintenance and support allowance provided for in this Act, the forms of application of those claiming to be entitled to such benefits, the methods of mak-

ing investigations and medical examinations, and the manner and form of adjudications and awards; *Provided*, That regulations relating to the nature and extent of the proofs and evidence shall provide that due regard shall be given to lay and other evidence not of a medical nature."

By another Act of July 3, 1930, c. 863, 46 Stat. 1016 (U. S. C., Supp. IV, Title 38, sec. 11), the so-called Consolidation Act, the President was authorized to create the Veterans' Administration, and the Administrator of Veterans' Affairs was given all the powers and duties formerly conferred on the Director of the Veterans' Bureau. Consequently, the powers conferred by section 5 of the amendment of July 3, 1930, to the World War Veterans' Act, on the "Director" are now vested in the "Administrator."

The World War Veterans' Act specifically confers on the Administrator, subject to the general direction of the President, full power and authority to make rules and regulations not inconsistent with the provisions of the Act which are necessary or appropriate to carry out its purposes, and such regulations, if not inconsistent with the Act, have the force and effect of law and the courts take judicial notice of them. *Union Bridge Co. v. United States*, 204 U. S. 364; *Caha v. United States*, 152 U. S. 211; *United States v. Eaton*, 144 U. S. 677; *Gratiot v. United States*, 4 How. 80, 117.

Section 19 of the World War Veterans' Act, as amended by the Act of March 4, 1925, c. 553, 43 Stat. 1302 (U. S. C., Title 38, sec. 445, provides:

"In the event of disagreement as to claim under a contract of insurance between the Bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the District Court of the United States in and for the District in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies."

In the case of *Edward Shields Cross v. United States*, in the United States District Court for the Eastern District of Tennessee, decided November, 1928, it appeared that the veteran's claim for insurance had been denied by a Claims and Rating Board of the Veterans' Bureau, and had not been

denied by the Director personally. The court held that a "disagreement" existed and a judgment was entered for the plaintiff. The Solicitor General declined to take an appeal.

Section 19 of the World War Veterans' Act was amended by the Act of July 3, 1930, 46 Stat. 993 (U. S. C., Supp. IV, Title 38, sec. 445), by adding the following provisions:

"The term 'claim' as used in this section, means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits and the term 'disagreement' means a denial of the claim by the director or someone acting in his name on an appeal to the director."

The definition of the term "disagreement" in this amendatory Act contains two provisions. A disagreement means a denial of the claim by the Administrator, and if a claim is denied by a lower board and an appeal is taken to the Administrator, a disagreement means the denial of the claim by the Administrator or someone acting in his name on an appeal to him. Under the first provision a disagreement is a denial of the claim by the Administrator, and the section does not specifically require personal action by him. Under section 5 of the World War Veterans' Act, as amended by the Act of July 3, 1930, *supra*, the Administrator has specific legislative authority to make rules and regulations to carry out the provisions of the Act, and to assign such duties to officers and employees of the Veterans' Administration as he deems proper, and *all official acts performed by such officers or employees especially designated therefor by the Administrator shall have the same force and effect as though performed by the Administrator in person*. Further, section 1 (b) of the Consolidation Act of July 3, 1930, provides:

"Under the direction of the President, the Administrator of Veterans' Affairs, shall have the power, by order or regulation, to consolidate, eliminate, or redistribute the functions of the bureaus, agencies, offices, or activities in the Veterans' Administration and to create new ones therein, and, by rules and regulations not inconsistent with law, shall

fix the function thereof and the duties and powers of their respective executive heads."

Under the provisions of that section and the terms of section 5 of the World War Veterans' Act, *supra*, it is not obligatory on the Administrator to pass on a claim personally but by appropriate regulation he may delegate to a lawfully constituted board of responsible officials the power to effect a disagreement. Neither the Director nor the Administrator has ever acted in the first instance on a claim, but that has been done uniformly by boards or agencies within the Bureau or Veterans' Administration. Furthermore, in the definition of disagreement in section 19, Congress showed it did not contemplate personal action by the Administrator on all claims by providing that where an appeal is taken by a claimant from an adverse ruling of a board or an official of the Veterans' Administration a disagreement may be effected by a denial of the claim by "someone acting in his [the Administrator's] name." Under the plain wording of the second clause of the definition of disagreement it clearly appears that the section does not require personal action by the Administrator.

In connection with the question relating to your power to delegate to the Solicitor of the Veterans' Administration authority to pass on cases in which appeals are taken to the Administrator, section 19 of the Act, as amended by the Act of July 3, 1930, contemplates the right of a claimant to a review of an adverse decision by an agency of the Veterans' Administration subordinate to you, by providing that the term "disagreement" means a denial of the claim by the Administrator or someone acting in his name on an appeal to the Administrator.

Section 2 of the Consolidation Act of July 3, 1930, provides that "final decisions or orders of any division, bureau, or board in the Veterans' Administration shall be subject to review, on appeal, by such Administrator," but that provision does not make it mandatory that a final decision of a board, bureau, or division of the Veterans' Administration must be reviewed by the Administrator personally, but only goes so far as to provide that such a decision or order shall be "subject to review, on appeal" by the Administrator, and under a proper regulation the Administrator could require

such decisions or orders to be submitted to him for review. He may likewise promulgate a proper regulation making the decision of such board or council final, unless an appeal is taken by the claimant. In the event an appeal is taken by a claimant from an adverse decision of a board, bureau, or division, it is not obligatory under the terms of that section that the Administrator personally review the action of the lower agency. The Administrator may or may not personally review such decision in accordance with such proper regulation as he may promulgate.

I am of the opinion that you have authority under the provisions of the amendatory Act of July 3, 1930, to the World War Veterans' Act, and the Consolidation Act of July 3, 1930, creating the Veterans' Administration, in accordance with the proposed regulation submitted by you, to confer power on the Insurance Claims Council to effect a disagreement as required by section 19 of the amendatory Act in cases where no appeal is taken to the Administrator, under such regulations as you promulgate to govern the procedure and action of that Council; and in cases in which an appeal is taken by the claimant from an adverse decision by such Council that you have authority to delegate to the Solicitor of the Veterans' Administration the power to act in the name of the Administrator.

Respectfully,

THOMAS D. THACHER,
Acting Attorney General.

To the ADMINISTRATOR OF VETERANS' AFFAIRS.

AUTHORITY OF SECRETARY OF WAR TO MODIFY LEASING
AGREEMENTS

Where property under the control of the Secretary of War has been leased, the Secretary is authorized, when advantageous to the Government, to execute a modified agreement with the lessee containing such stipulations as are herein suggested.

DEPARTMENT OF JUSTICE,
September 15, 1931.

SIR: By letter dated August 4, 1931, you request my opinion as to your right to modify, by agreement with the

lessee, an agreement of lease heretofore executed by you. It appears that pursuant to the Act of July 11, 1919 (41 Stat. 129), you executed a lease dated June 12, 1922, by which certain real property, acquired by the United States of America for storage purposes for the use of the Army, and which in your judgment was no longer needed for use by the United States, was leased to the Board of Commissioners of the Port of New Orleans. Certain supplemental lease agreements were thereafter made, and under date of December 29, 1930, a sixth supplemental agreement, including certain additional property, was executed.

The latter agreement provided, so far as now material, that the lessee should make repairs to the interior and exterior of warehouses Nos. 1 and 2 (which were a part of the property so leased), and keep the same in as good state of repair and working order as when first occupied by the lessee. I understand that at the time the lease was executed it was estimated by both parties that the cost of such repairs would be approximately \$6,800.00 per annum, and, accordingly, the sixth supplemental agreement provided that if the average annual cost should be less than that amount, the lessee should pay the difference to the Government, for a period of five years, ending January 31, 1936, and that if such average annual cost should be greater than \$6,800.00, the rental for the five-year period, commencing February 1, 1936, should be decreased by the difference between the average annual cost and \$6,800.00.

I understand that when the lessee entered into possession, under the sixth supplemental agreement, it was discovered that the roofs of warehouses Nos. 1 and 2 were in such a defective condition as to require repairs costing approximately \$10,000.00 for each warehouse, and, also, that it was discovered that fire doors and fire hose in warehouse No. 2 were in urgent need of repairs. It appears that both parties to the agreement were in ignorance of these conditions when it was executed. Since these conditions existed at the time the lessee went into possession, the provisions of the sixth supplemental agreement would not require the lessee to make these necessary repairs to warehouses Nos. 1 and 2. It appears, however, that such repairs should be promptly

made to protect the buildings against deterioration, and in the case of fire doors and fire hose, against possible destruction by fire.

It is now proposed to enter into a new agreement modifying the sixth supplemental agreement so that the lessee will assume an obligation to make these necessary repairs, and providing that the cost thereof may be deducted from the rent by a method to be fixed in the agreement.

In an opinion of the Attorney General, under date of June 12, 1930, you were advised that you were authorized, in leasing property under your control, pursuant to the Act of July 28, 1892 (27 Stat. 321) to make such stipulations as are usual between landlord and tenant, and reasonably necessary for the proper execution of the power to lease the property (36 Op. 283.) The Attorney General there said (p. 287):

“ * * * the general principle to be applied is whether the stipulation in the lease is one germane to the subject matter of the lease, not unusual in such transactions, and reasonably calculated to make effective the power to lease and enable you to make leases advantageous to the Government, which are matters which you may determine in the exercise of a reasonable discretion.”

While each case is dependent upon its particular facts, it seems to me entirely clear, as a general principle, that, as a necessary incident to the making of leases of property under your control, you may in the exercise of sound discretion, modify such leases by subsequent agreements which are advantageous to the Government, and are not merely for the benefit of a lessee who desires to be relieved from a bad bargain. Subject to such limitations the agreement of modification may include any provisions which you would have been authorized to include in the original lease.

Since it is clear that you could have provided by the sixth supplemental agreement that the lessee should make the repairs now under consideration, and that the cost thereof should be deducted from the rental, and since I understand that it is your view that it will be advantageous to the United States to have such repairs made promptly, and that this result can be achieved by modification of the agreement, it

is my opinion that you are authorized to execute a modified agreement containing the stipulations which you have suggested.

Respectfully,

THOMAS D. THACHER,
Acting Attorney General.

TO THE SECRETARY OF WAR.

**AUTHORITY OF EMPLOYEES' COMPENSATION COMMISSION
UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS'
COMPENSATION ACT**

The United States Employees' Compensation Commission, under the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, 1442), has broad power and authority to administer its provisions and specifically to make rules and regulations for this purpose which shall be binding upon deputy commissioners as well as upon the Commission.

DEPARTMENT OF JUSTICE,
October 3, 1931.

SIR: I have the honor to reply to your request of August 7, 1931, for my opinion upon the following questions submitted by the United States Employees' Compensation Commission.

"1. In the interest of uniformity in the interpretation of the Longshoremen's and Harbor Workers' Compensation Act in all places where it operates, is it the duty of the United States Employees' Compensation Commission to interpret the law and require such interpretation to be followed by all employees of the Commission, including its deputy commissioners, until there are authoritative decisions by the courts?

"2. Are the rules and regulations the Commission is authorized and required to make in connection with its administration of the law when duly promulgated binding upon it and all of its employees and the public until changed by the Commission?

"3. Are the deputy commissioners appointed by the Commission pursuant to this law required to perform all their duties for and on behalf of the Commission and in accord-

ance with its rules, regulations, orders, and instructions; if not, which duties do deputy commissioners perform free from control by the Commission?"

By section 39 of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424, 1442) it is provided that:

"(a) Except as otherwise specifically provided, the United States Employees' Compensation Commission shall administer the provisions of this Act, and for such purpose the commission is authorized (1) to make such rules and regulations; (2) to appoint and fix the compensation of such temporary technical assistants and medical advisors, and, subject to the provisions of the civil service laws, to appoint, and, in accordance with the Classification Act of 1923, to fix the compensation of such deputy commissioners [except certain state officers] * * * and other officers and employees; and (3) to make such expenditures * * * as may be necessary in the administration of this Act. * * *

"(b) The commission shall establish compensation districts, * * * and shall assign to each such district one or more deputy commissioners, as the commission deems advisable. * * *

Other sections of the Act provide for certain powers to be exercised and duties to be performed by the Commission and for certain powers to be exercised and duties to be performed by the deputy commissioners in their respective districts. Some duties of the deputy commissioners are to be performed "in accordance with regulations prescribed by the Commission"; in connection with others there is no such specific requirement. The following excerpt from the statute is illustrative.

"SEC. 19. (a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the commission at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

"(b) Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by

the commission, shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

“(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days’ notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b), the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

“(d) At such hearing the claimant and the employer may each present evidence in respect of such claim and may be represented by any person authorized in writing for such purpose.” (44 Stat. 1435.)

Succeeding sections provide that orders of the deputy commissioners shall become final after thirty days but, if not in accordance with law, may be suspended or set aside through injunction proceedings against the deputy commissioner in a district court of the United States. It is further provided that a deputy commissioner shall not be bound by common-law or statutory rules of evidence or by technical or formal rules of procedure but may proceed in such manner as best to ascertain the rights of the parties. He is given power to preserve and enforce order, to administer oaths, to compel the attendance and testimony of witnesses and “to do all things conformable to law which may be necessary to enable him effectively to discharge the duties of his office.”

The statute thus provides a scheme for the determination of compensation for injuries on navigable waters and im-

poses certain duties on the deputy commissioners; but an examination of the entire Act makes it plain that Congress intended that the general responsibility for the proper administration of its provisions should rest on the Commission. As has been shown, the Commission is specifically authorized by section 39 of the Act "to make such rules and regulations * * * as may be necessary in the administration of this Act." The title "deputy commissioner" and the fact that the deputy commissioners are appointed by the Commission are further factors which tend to show that the deputy commissioners perform their duties subject to the general supervision of the Commission.

The authority given the Commission to make general rules and regulations, in my opinion, extends not only to matters of practice and procedure but to questions of the proper interpretation of the law which it is the Commission's duty to administer. Regulations are issued by the Treasury Department representing that Department's interpretation of the revenue laws, and these regulations are binding upon all officials of the Department until they are held invalid by the courts. Similarly it is my opinion that the United States Employees' Compensation Commission may by general regulations instruct the deputy commissioners as to the interpretation of the law to be adopted by them in the absence of a controlling court decision. Such regulations would be binding on the Commission and on the deputy commissioners until they were either changed by the Commission or held invalid by the courts.

It is not the duty of the Commission to decide specific cases, and the general powers given to the Commission by the Act do not authorize the Commission to supervise the deputy commissioners in such matters as the weight to be given to certain testimony in a particular case. It is the duty of the deputy commissioner to hear and evaluate the testimony, and with this duty the Commission may not interfere.

The questions submitted by the Commission are very general and do not refer to specific cases. It is believed that the principles which must guide the Commission in adopting rules and regulations have been stated. As I have indicated, it is my view that the Commission under the Act has

broad power and authority to administer its provisions and specifically to make rules and regulations for this purpose which shall be binding upon deputy commissioners as well as upon the Commission.

I shall be glad to respond to any request from you for further opinions relating to particular problems as they arise.

Respectfully,

THOMAS D. THACHER,
Acting Attorney General.

To the PRESIDENT.

PORTO RICO—VALIDITY OF BOND ISSUE

The proposed issue by the Government of Porto Rico of bonds of the face value of \$150,000, the proceeds from the sale of which are to be used in the payment of the principal of, and interest on, bonds previously issued and sold for the construction, operation, and maintenance of the Isabela Irrigation System, being authorized by Congress and by Joint Resolution No. 12 of the Legislature of Porto Rico of July 3, 1929, and all statutory requirements regarding the issue and sale of the bonds having been complied with, said bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of the people of Porto Rico.

DEPARTMENT OF JUSTICE,
November 6, 1931.

SIR: I have the honor to acknowledge receipt of your letter of October 29, 1931, stating that your Department has been authorized to sell for the account of the Government of Porto Rico bonds of the face value of \$150,000, the proceeds of which are to be used in the payment of the principal of, and interest on, bonds previously issued and sold for the construction of the Isabela Irrigation System and of the costs of maintenance and operation of said system until such time as the funds necessary for such purposes shall be produced from assessments levied upon lands included within the irrigation district.

The proposed bonds are to be issued under authority contained in section 3 of the Act of Congress approved March 2, 1917, entitled "An Act To provide a civil government for Porto Rico, and for other purposes," as amended by the Act of March 4, 1927 (c. 145, 39 Stat. 951, 953; c. 503, 44 Stat.

1418; U. S. C., Title 48, secs. 741, 745), and Joint Resolution No. 12 of the Twelfth Legislature of Porto Rico, approved July 3, 1929, a copy of which was enclosed with your letter. The validity of prior instalments of bonds authorized by the same Joint Resolution was sustained in my opinions of November 27, 1929, and December 9, 1930. (36 Op. 107, 378.)

You state that the bonds are to be issued and sold by you at the request of the Treasurer of Porto Rico, in coupon form, in the denomination of \$1,000 each, to be dated January 1, 1932, and to bear interest at the rate of $4\frac{1}{2}$ per centum per annum, payable semiannually on January 1 and July 1, of each year, the principal thereof to be payable at the Treasury of the United States in series on July 1, 1971, and July 1, 1972. A copy of the form of the proposed bond is submitted with your letter and you request my opinion upon the legality of the issue.

Section 3 of the Act of March 2, 1917, as amended, provides:

“ * * * and when necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Porto Rico or any municipal government therein as may be provided by law, and to protect the public credit: *Provided, however,* That no public indebtedness of Porto Rico and the municipalities of San Juan and Ponce shall be allowed in excess of 10 per centum of the aggregate tax valuation of its property * * *. In computing the indebtedness of the people of Porto Rico, municipal bonds for the payment of interest and principal of which the good faith of the people of Porto Rico has heretofore been pledged and bonds issued by the people of Porto Rico secured by bonds to an equivalent amount of bonds of municipal corporations or school boards of Porto Rico shall not be counted, but all bonds hereafter issued by any municipality or subdivision * * * for which the good faith of the people of Porto Rico is pledged shall be counted.”

The documents submitted with your letter show that the aggregate assessed valuation of real and personal property in Porto Rico on June 30, 1931, amounted to \$331,683,530, that on September 22, 1931, there were outstanding bonds of the Government of Porto Rico of the face value of \$29,178,000, and notes evidencing temporary loans of the

face value of \$395,494.54, and that since the amendatory Act of March 4, 1927, the good faith of the people of Porto Rico has been pledged to the payment of principal and interest on municipal bonds aggregating \$1,330,500, which must be added to the foregoing, thus making a total of \$30,903,994.54 to be considered when ascertaining the total bonded indebtedness which the Government of Porto Rico is authorized to incur. Therefore, it is apparent that the proposed issue will not increase the bonded indebtedness beyond 10 per centum of the aggregate of the assessed valuation, the maximum permitted by law.

Sections 3 and 4 of Joint Resolution No. 12, *supra*, provide:

"SECTION 3. For the purpose of providing funds for the payment of principal of, and interest on, the bonds already issued and sold for the construction of the irrigation system, as well as for the operation and maintenance of said system until such time as the funds necessary for these purposes are produced by such assessments as may be levied on irrigated lands, as hereinbefore provided, and by the proceeds of other receipts, derived from said system, the Treasurer of Porto Rico is hereby authorized, empowered and directed to issue bonds of The People of Porto Rico to the amount of one million, two hundred and fifty thousand (1,250,000) dollars, or such part thereof as may be necessary.

"SECTION 4. Said bonds shall be sold on such terms as may be most favorable to The People of Porto Rico and shall be issued in series so that the proceeds of the sale thereof may be available on the dates and in the amounts stated below:

\$750,000 on January 1, 1930.
150,000 on January 1, 1931.
150,000 on January 1, 1932.
100,000 on January 1, 1933.
100,000 on January 1, 1934."

It is further provided by the Joint Resolution that the bonds may be in coupon or registered form, in denominations of one thousand, five thousand, and (or) ten thousand dollars, shall bear interest at a rate not exceeding five per centum per annum, payable semiannually, and shall be redeemable in series on prescribed dates and in prescribed

amounts; that the bonds may be sold by the Secretary of War or by the Treasurer of Porto Rico, with the approval of the Governor, upon such terms as may be most favorable to the people of Porto Rico, and that the Treasurer, with the approval of the Governor, under the limitations prescribed therein, shall have absolute charge and authority in connection with all matters relating to said bonds; that the proceeds from the sale of the bonds shall be devoted to the payment of the principal of, and interest on, the bonds theretofore issued and sold for the construction of the irrigation system, and of the costs of operation and maintenance of the system until sufficient funds for these purposes are realized from the assessments levied by the Act. For the payment of both principal and interest the good faith of the people of Porto Rico is irrevocably pledged.

There was transmitted with your letter a statement signed by the Treasurer of Porto Rico, setting forth his determinations in those matters left to his discretion, and this has been approved by the Acting Governor, in accordance with the Joint Resolution.

I find that all the statutory requirements regarding the issue and sale of the said bonds have been complied with and that the form of bond submitted is in compliance with the law and the determinations of the Treasurer, approved by the Governor. The form of bond properly recites that "under the provisions of section 3 of the Act of Congress, approved March 2, 1917, as amended by the Act of March 4, 1927, this bond is exempt from taxation by the Government of the United States, or by the Government of Porto Rico or of any political or municipal subdivision thereof, or by any State, Territory, or possession, or by any county, municipality, or other municipal subdivision of any State, Territory, or possession of the United States, or by the District of Columbia."

It is therefore my opinion that the bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of the People of Porto Rico.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF WAR.

INDIAN COAL AND ASPHALT LANDS—DISPOSITION OF
ROYALTIES

The Kali-Inla Coal Company, having leased and later having purchased the coal and asphalt deposits contained in a certain tract of the segregated coal and asphalt lands of the Choctaw and Chickasaw Indian Nations of Oklahoma, is not entitled to a credit on the purchase price of said deposits for royalties under its lease, accruing between the date its bid was made at the auction and the date when approval of the sale was given by the Secretary of the Interior.

DEPARTMENT OF JUSTICE,
November 30, 1931.

SIR: Reference is made to your letter of July 16, 1930, requesting my opinion as to the disposition which should be made of certain royalties standing to the credit of the Kali-Inla Coal Company, lessee, now the owner, by purchase, of the coal and asphalt deposits contained in a specified tract of the segregated coal and asphalt lands of the Choctaw and Chickasaw Indian Nations of Oklahoma.

It appears that the coal and asphalt deposits contained in this tract of land were offered for sale, subject to the existing lease thereon, on December 11, 1918, under the provisions of the Act of February 8, 1918 (40 Stat. 433), and regulations of your Department adopted thereunder. A pamphlet containing a list of properties offered for sale and the terms of sale was distributed by authority of the Secretary of the Interior and the bid of the Kali-Inla Coal Company, was made under the terms of sale contained in such pamphlet. The Kali-Inla Coal Company, the lessee, was the highest and best bidder at the sale, which was approved by the Secretary of the Interior on August 29, 1919.

It further appears that the coal company has paid royalties as they accrued under its lease to the date of the approval of the sale, and has also paid the purchase price of the deposits, except the sum of \$1,683.65, and that the money so paid has been placed to the credit of the Choctaw and Chickasaw Nations. The coal company now claims a credit on the purchase price of \$1,683.65, which represents the amount of the royalties so accrued and paid by it between the date of the auction and the date of the approval of the company's bid by the Secretary of the Interior.

The question presented is whether or not, under the applicable statute, regulations of the Department of the Interior, and the terms of sale, the purchaser is entitled to a credit for the royalties accrued and paid by it between the date of the auction and the date of the approval of the sale by the Secretary of the Interior.

Section 1 of the Act of February 8, 1918, is, in part, as follows:

"That the Secretary of the Interior is hereby authorized to sell the coal and asphalt deposits, leased and unleased, in the segregated mineral area of the Choctaw and Chickasaw Nations, in Oklahoma, in the manner hereinafter set forth."

Section 2 of the Act is as follows:

"That the sale of such deposits shall be thoroughly advertised, and shall not later than six months from the final appraisement be offered for sale to the highest bidder at public auction in tracts to conform with such appraisement at not less than the appraised value so fixed, except that isolated tracts of less than nine hundred and sixty acres may be sold separately under like provisions: *Provided*, That twenty per centum of the purchase price shall be paid in cash, and the remainder shall be paid in four equal annual payments from the date of the sale, and all deferred payments on all deposits sold under the provisions of this Act shall bear interest at the rate of five per centum, and shall mature and become due before the expiration of four years after the date of such sale."

Section 4 of the Act provides that the deposits of coal or asphalt on the leased lands shall be sold subject to all rights of the lessee, and that any person acquiring the deposits of asphalt shall take the same subject to said rights and that the Department of the Interior will relinquish all authority over the operation of the mines previously exercised by it by reason of the Indian ownership of the leased property.

Section 6 of the Act authorizes the Secretary of the Interior to

"prescribe such rules and regulations, terms, and conditions, not inconsistent with this Act, as he may deem necessary to carry out its provisions."

Pursuant to the authority conferred by said section 6, the Secretary of the Interior, on September 24, 1918, pre-

scribed regulations covering the sale of the coal and asphalt deposits in question.

Section 1 of such regulations provides that:

"The sale of said coal and asphalt shall be conducted under the supervision of the Superintendent for the Five Civilized Tribes, subject to the approval of the Secretary of the Interior."

Section 3 provides in part that:

"The Superintendent for the Five Civilized Tribes shall advertise and sell said coal and asphalt deposits at public auction, to the highest and best bidder, for not less than the appraised value, subject to the approval of the Secretary of the Interior, in accordance with the law, approved schedules and these regulations and when and as directed by the Commissioner of Indian Affairs."

Section 13 provides in part that:

"All royalty paid on coal or asphalt mined subsequent to the date of approval of the sale shall belong to the purchaser, subject to the requirement of a certain amount per ton, as above stated, to be paid to the Superintendent for the Five Civilized Tribes, to be applied on the purchase price, which is to protect the Choctaw and Chickasaw tribes from loss on account of coal removed in case the tract should be forfeited before final payment is made."

Section 15 provides in part that:

"Immediately after any sale, schedules of the successful bidders shall be prepared and forwarded to the Commissioner of Indian Affairs for approval or disapproval."

Section 16 provides that:

"Immediately after the approval by the Secretary of the Interior of the sales in any district, each bidder whose bid has been approved shall be furnished with a certificate of purchase describing the tract included in his bid and setting forth the conditions of the sales and the terms upon which payments are to be made and title obtained, and stating until the full purchase price has been paid all mining operations shall be conducted under the supervision of the said representative of the United States Bureau of Mines and the Mining Trustees of the Choctaw and Chickasaw Nations, or such other officer or officers as may be designated by the Commissioner of Indian Affairs, which certificate of

purchase will entitle the purchaser to possession of the coal and asphalt in the tract purchased by him, subject to all of the conditions authorizing the sale thereof, as provided by said Act of Congress, and all of the conditions provided for in these regulations."

Section 24 provides that:

"The right is reserved to reject any and all bids and to approve or disapprove any and all sales."

Such of the provisions of the regulations prescribed by the Secretary of the Interior under the Act of February 8, 1918, as refer to proceedings in connection with the making of bids for the deposits indicate the tentative nature of any sale thereunder until the approval of the Secretary himself shall be given. You will note that in section 1 the sale of the coal and asphalt is directed to be conducted by the Superintendent of the Five Civilized Tribes, subject to the approval of the Secretary; and that by section 3 such sale shall be subject to the approval of the Secretary in accordance with the law, approved schedules, and the regulations themselves.

You will also note that in section 13 of the regulations specific provision is made for the disposition of all royalty paid on coal or asphalt mined subsequent to the date of approval of any sale. This is the only reference in the regulations to the disposition of royalties. It seems, therefore, that a specific provision that royalties shall go to the purchaser after approval of a sale indicates that the Secretary adverted to the question of royalties and by that provision excluded purchasers from any benefit of royalty until such approval had been had.

Further evidence that the intention of the regulations was to withhold rights usually those of a purchaser is to be found in section 16, providing that after the approval of any bid the bidder whose bid has been approved shall be furnished with a certificate of purchase describing the tract sold, the terms, etc., and that such certificate will entitle him to possession of the coal and asphalt in the tract purchased. Until the approval of his bid made at a sale, therefore, a successful bidder was not entitled to possession, which is indicative of the tentative nature of the transaction until approved by the Secretary of the Interior. Thus in the interval between

the date of sale and the date of approval, the Kali-Inla Coal Company was in possession of the tract in question, not as purchaser but as lessee under its existing lease, and it would seem to follow that one of the burdens of possession under such lease, i. e., the obligation to pay royalty thereunder, should continue to be borne by the company as the party enjoying possession under such lease until it should have the right of possession under a certificate of purchase.

In the pamphlet offering and describing the deposits to be sold it is stated on page 3 that all *bids* will be accepted subject to the approval of the Secretary of the Interior. The use of the word "bid" is descriptive of an intention that any proposal made by a prospective purchaser at a sale should be in the nature of an offer to be accepted by the Secretary of the Interior.

I am informed that in your Department the practice was adopted of charging interest on deferred payments of the purchase price from the date of approval of any sale and not from the date of the sale. Such practice, acquiesced in by the purchaser, is consistent with the view that all arrangements were tentative to the date of approval, since to have freedom from royalty payments on the one hand and freedom from interest on account of deferred payments on the other hand is to enjoy inconsistent benefits.

It is my opinion, therefore, that the Kali-Inla Coal Company is not entitled to a credit on the purchase price of the deposits purchased by it for royalties paid under its lease, accruing between the date its bid was made at the auction and the date when approval of its bid was given by the Secretary of the Interior.

Respectfully,

WILLIAM D. MITCHELL

To the SECRETARY OF THE INTERIOR.

CONSTRUCTION OF 107TH ARTICLE OF WAR REQUIRING
ENLISTED MEN TO MAKE GOOD TIME LOST

Private Floyd Ellis and Private Ward B. Waits, enlisted men, had been absent on 24-hour passes and were returning to their station on a two-seated motor cycle belonging to Ellis, several hours after expiration of the 24-hour period, when the lights of the motor cycle suddenly failed, causing Ellis to lose control of the machine, which ran into a fence along the road, injuring both men and thereby rendering them unable for more than one day to perform duty. *Held*, that the injuries sustained by Privates Ellis and Waits were not the result of their own misconduct within the meaning of the provision of the 107th Article of War, requiring enlisted men to make good time lost.

DEPARTMENT OF JUSTICE,

December 2, 1931.

SIR: I have the honor to comply with your request of July 9, 1931, for my opinion concerning the construction to be placed upon the language of the 107th Article of War (Act June 4, 1920, c. 227, 41 Stat. 759, 809; U. S. C., Title 10, sec. 1579) requiring an enlisted man to serve beyond his ordinary enlistment period in order to make up time lost "through disease or injury the result of his own misconduct."

The question arises in connection with the cases of Private Floyd Ellis and Private Ward B. Waits, which are now before you for action. These two enlisted men had been absent on 24-hour passes and were returning to their station on a two-seated motor cycle belonging to Private Ellis, several hours after expiration of the 24-hour period, when the lights of the motor cycle suddenly failed, causing Ellis to lose control of the machine, which ran into a fence along the road, injuring both men. These injuries rendered them unable for more than one day to perform duty.

The provision of the statute is as follows:

"Every soldier who in an existing or subsequent enlistment deserts the service of the United States or without proper authority absents himself from his organization, station, or duty for more than one day, or who is confined for more than one day under sentence, or while awaiting trial and disposition of his case, if the trial results in conviction, or through the intemperate use of drugs or alcoholic liquor, or through disease or injury the result of his own misconduct, renders himself unable for more than one day to per-

form duty, shall be liable to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement, or inability to perform duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve."

For the purpose of this opinion, I assume that the view of your Department that such tardiness did constitute misconduct is correct. However, under the statute, it is requisite that injury should result from the misconduct.

"Result" is a word in common use and indicates a necessary relation of cause and effect. It is necessary, therefore, under the statute that there should have been a causal connection between the tardiness of Ellis and Waits and their injuries. While it may be said that if the two men had returned to their station within the time limited by their passes they would not have been present at the time and place of the accident, so that, in a sense, their tardiness was the cause of their presence at that time and place, it was not their mere presence there which caused the injuries. The immediate cause of the injuries was a collision between the motor cycle upon which they were riding and the fence, and the more remote cause of the injuries was the failure of the lights. There is no indication that the point at which the accident occurred was so peculiarly dangerous that mere presence alone necessarily exposed the men to hazard. While their failure to return in time permitted their presence at the time and place of the accident, the injuries cannot be said to be the result of their tardiness.

It is my view, therefore, that under the statute it cannot be held that the injuries to Ellis and Waits resulted from their own misconduct, to wit, their failure to return to their stations within the time limit of their passes. A somewhat analogous statutory provision which required an interpretation of the meaning of the word "result" was considered in Attorney General Sargent's opinion of June 12, 1926 (35 Op. 76), and in my opinion of May 17, 1929 (36 Op. 61), and the views there expressed support my present conclusions.

The opinion which I have expressed coincides with that of the Judge Advocate General of the Army, which appears to have been followed in many cases. It also appears that the Navy Department has reached the same general conclusion under similar legislation.

It is my opinion, upon the facts submitted to me, that the injuries sustained by Private Floyd Ellis and Private Ward B. Waits were not the result of their own misconduct within the meaning of the provision of the 107th Article of War.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF WAR.

ESTABLISHMENT OF PUMPING STATIONS WITHIN PUBLIC
DOMAIN IN CONNECTION WITH PIPE LINES.

Under section 28 of the Act of February 25, 1920 (41 Stat. 437, 449), wherever it is made to appear to the satisfaction of the Secretary of the Interior that the establishment of a pumping station in a public domain in connection with a pipe line for the transportation of oil and gas is reasonably necessary for the operation of the pipe line, he has authority to authorize the grantee to construct such a pumping station and provide the site reasonably necessary for that purpose.

DEPARTMENT OF JUSTICE,

December 2, 1931.

SIRS: Under date of July 24, 1931, you requested my opinion as to whether section 28 of the Act of February 25, 1920, 41 Stat. 449, authorizes the Secretary of the Interior to grant a right of way over the public domain for a pipe line for the transportation of oil and gas, and to grant a right for the construction of pumping stations to be located outside of the fifty-foot strip in which the pipe line is located. The statute is as follows:

“That rights of way through the public lands, including the forest reserves, of the United States are hereby granted for pipe line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 1 of this Act, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations as to survey, loca-

tion, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers: *Provided*, That the Government shall in express terms reserve and shall provide in every lease of oil lands hereunder that the lessee, assignee, or beneficiary, if owner, or operator or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing gas or oil under the provisions of this Act: *Provided further*, That no right of way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section or the regulations prescribed by the Secretary of the Interior shall be ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof is located in an appropriate proceeding."

There is no express reference in the statute to pumping stations, and the question is whether the power to grant sites for pumping stations is necessarily implied.

It is contended, on the one hand, that a grant of this kind is to be construed strictly in favor of the Government and is not to be extended by implication. On the other hand, it is urged that pumping stations are absolutely necessary to operate pipe lines and that without them the pipe lines are useless and it must necessarily be implied that the Secretary of the Interior has authority in proper cases to grant rights for the construction of pumping stations in the public domain as a necessary part of the pipe line. The information supplied with the request for an opinion discloses that oil cannot be transported through pipe lines by gravity for any considerable distance and that without pumping stations at certain intervals a pipe line for the transportation of oil and gas would be practically useless, and that a pumping station cannot be constructed within

the limits of the fifty foot strip. Under these conditions it seems to me that wherever it is made to appear to the satisfaction of the Secretary of the Interior that the establishment of a pumping station in a public domain in connection with such a pipe line is reasonably necessary for the operation of the pipe line, he has authority to authorize the grantee to construct such a pumping station and provide the site reasonably necessary for that purpose. Any other construction of the Act would render the grant of a right of way for pipe line purposes entirely useless. Congress must have intended that the rights of way granted should be of practical use and that pipe lines when laid would be useful instrumentalities for the transportation of oil and gas. It is not reasonable to suppose Congress intended to enact legislation which could not effect the purpose for which it was intended and which would require supplemental legislation in order to make it effective.

The arguments for and against this construction of the Act are fully set forth in the opinion of the Solicitor of the Department of the Interior, dated July 24, 1931, and the opinion of the Acting Solicitor of the Department of Agriculture, dated July 13, 1931. The conclusions I have reached seem to be adequately supported by *United States v. Denver and Rio Grande Rwy. Co.*, 150 U. S. 1; *Russell v. Sebastian*, 233 U. S. 195; *Imperial Irrigation Company v. Jayne*, 138 S. W. 575. Of course cases can be imagined where the distance traversed by a pipe line across the public domain is short, and that fact taken in connection with the location of pumping stations along the pipe line outside of the public domain would show the absence of any reasonable necessity for the construction of a pumping station in the public domain. These are all matters to be taken into consideration by the Secretary of the Interior. He has power to use a reasonable discretion in determining whether in any particular case it is necessary that a pumping station be located in the public domain. The request for my opinion indicates that the question has recently arisen in connection with the application for grant of a right over 14.72 acres to be used as the site of a pumping station in connection with the pipe line through the Santa Barbara National Forest. There are no facts presented which afford any

basis for my opinion as to whether an area of that size is reasonably necessary, and I am expressing no opinion on that point. It is enough to say that the tract of land for a pumping station should be limited in size to what the Secretary of the Interior, on the facts of the particular case, deems necessary.

Because the power to grant a right for pumping stations is one necessarily implied on the ground of necessity to make the pipe line operative, it follows that the reasonable necessities incident to the operation of the pipe line and not merely the convenience of the grantee should form the basis for the exercise of the Secretary's judgment. It appears that for more than eight years past the Secretary of the Interior has administered the Act on the assumption it authorizes him to grant rights for pumping stations on tracts in addition to the fifty-foot strip, and from time to time grants have been made in accordance with that construction of the statute. It is well settled that the practical construction given to a statute by the officer charged with the duty of enforcing and administering it is entitled to great weight. It is fair to assume that if the Congress had been dissatisfied with this construction of the Act by the Secretary of the Interior it would have taken legislative steps to overturn it. Conceding that the question was a debatable one, it would not be consistent with well-established principles to overturn at this date an administrative construction in reliance on which grantees have acted in good faith.

Respectfully,

WILLIAM D. MITCHELL.

To The SECRETARY OF THE INTERIOR.

To The SECRETARY OF AGRICULTURE.

LEASE OF THE STATE CAMP FOR VETERANS AT BATH, N. Y.

The State Camp for Veterans at Bath, N. Y., was leased for a term of years by the State of New York to the Board of Managers of the National Home for Disabled Volunteer Soldiers, without rental or charge, upon condition that the same be maintained as a home for veterans of the wars of the United States and that the veterans of the Civil and Spanish-American Wars, who were inmates at the time of the lease, should be maintained therein during the term of the lease, subject to reasonable rules and regulations of the lessee. *Held*, that while the lease did not create any obligation upon the lessee, it did give the lessee the right to remain in possession of the property so long as the Congress should see fit to appropriate funds to maintain it, not beyond the extended term specified, and that whether or not this right belonged to the United States prior to the Act of July 3, 1930 (46 Stat. 1016), by virtue of the fact that the National Home for Disabled Volunteer Soldiers was a governmental agency, that Act has operated to vest all the rights of the lessee in the United States.

DEPARTMENT OF JUSTICE,
December 2, 1931.

SIR: I have the honor to reply to your letter of April 29, 1931, asking my opinion "as to the validity of a contract dated February 26, 1929, between the State of New York and the Board of Managers of the National Home for Disabled Volunteer Soldiers, whereby the State Camp for Veterans at Bath, New York, was leased to the United States for a term not exceeding ten years, without rental or charge, upon condition that the same be maintained as a home for veterans of the wars of the United States and that the veterans of the Civil and Spanish-American Wars, who were inmates at the time of the lease, should be maintained therein during the term of the lease, subject to reasonable rules and regulations of the lessee."

You state in your letter that "on June 27, 1930, the State of New York, upon application by the Board of Managers, extended the term of this lease to forty years from the date of the expiration of the first lease upon the same condition." You further state that "the National Home for Disabled Volunteer Soldiers with its branches was transferred to and consolidated in the Veterans' Administration under the Executive Order of July 21, 1930, in accordance with the provision of Public 536, 71st Congress." (46 Stat. 1016.)

By the Act of March 5, 1928 (c. 240, Laws of New York, 1928), the New York Legislature created a temporary commission

"to negotiate with the proper authorities of the United States, for the transfer of title or the surrender of the possession and use to the United States, * * * of the State camp for veterans at Bath, * * *"

such transfer or surrender to be made

"only on the condition that the United States, through its proper and authorized authorities, shall agree that such camp shall be perpetually maintained and used as a camp or home for veterans of the wars of the United States, * * *."

Apparently as a direct result of this statute Congress enacted the Act of May 26, 1928 (c. 767, 45 Stat. 758), which provided in part:

"That the Board of Managers of the National Home for Disabled Volunteer Soldiers, when directed by the President, is authorized to accept on behalf of the United States, free from all encumbrances and without cost to the United States, title in fee simple to the land, including buildings and structures, constituting the camp for veterans at Bath, New York. Upon acceptance of such land by such Board of Managers, such land, buildings, and structures shall become a branch home of the National Home for Disabled Volunteer Soldiers."

The Act of May 26, 1928, *supra*, was adopted upon the recommendation of the Board of Managers of the National Home for Disabled Volunteer Soldiers that additional domiciliary facilities in the northeast part of the United States were necessary to take care of the constantly increasing membership in the Home. (See House Report No. 1611, and Senate Report No. 1222, 70th Cong., 1st Sess.)

Shortly after the passage of the Act of May 26, 1928, *supra*, the Chief Coordinator of the United States called a conference between representatives of the State of New York and of various establishments and Departments of the United States to effectuate the proposed transfer. A representative of this Department was present at that con-

ference, and others which followed, in an advisory capacity to the Chief Coordinator. Reference to files of this Department discloses that the parties to these conferences were of the opinion that the New York statute and the Federal statute above quoted were in conflict, and that the Federal statute did not authorize or permit the transfer to the United States of the fee simple title to the camp at Bath upon the condition of perpetual maintenance annexed to the transfer by the New York statute. But although the conferees deemed the transfer of the fee simple title to the United States to be legally impossible, they were of the opinion that, wholly apart from the Act of May 26, 1928, the Board of Managers of the National Home for Disabled Volunteer Soldiers had authority to take a lease of the camp if the New York authorities had power to make it. Apparently as a result of these conferences the authority of the New York commission above referred to was extended by the Act of February 26, 1929 (c. 33, Laws of New York, 1929), and the commission was authorized

*"to lease to the United States or to the board of managers of the National Home for Disabled Volunteer Soldiers, a corporation created by act of Congress * * *, without rental or charge, the state camp for veterans at Bath, New York, for a term not exceeding ten years, upon the condition that such camp shall be maintained by the lessee during the term of such lease as a camp or home for veterans of the wars of the United States, and that the veterans of the Civil war and the veterans of the Spanish-American war, who are inmates of such camp at the time of the transfer of possession under such lease shall be maintained therein by the lessee during the term of such lease, * * *."* (Italics supplied.)

This Act further provided that:

"Upon the surrender of possession and use of the state camp for veterans at Bath, under such lease, jurisdiction of the land included in such camp shall be ceded to the United States by this state, upon condition that the jurisdiction so ceded shall not prevent the execution thereon of any process, civil or criminal, issued under the authority of the state, except as such process might affect the property of the United States therein, and that such jurisdiction shall continue in

the United States so long only as such land shall remain in the possession of the United States or in said *board of managers of the National Home for Disabled Volunteer Soldiers.*" (Italics supplied.)

Under date of February 26, 1929, the lease authorized by the statute just quoted was duly executed by the statutory commission on behalf of "the people of the State of New York, lessor," to "the Board of Managers of the National Home for Disabled Volunteer Soldiers, a corporation created by Act of Congress, approved March 3, 1865, the lessee." The lease was "without rental or charge" but, following the language of the statute,

"upon the condition that such camp shall be maintained by the lessee during the term of this lease as a camp or home for veterans of the wars of the United States and that the veterans of the Civil War and veterans of the Spanish-American War, who are inmates of such camp at the time of the transfer of possession under this lease, shall be maintained therein by the lessee during the term of this lease, subject to the reasonable rules and regulations of the lessee."

The lease did not purport in any way to bind the United States as distinguished from the Board of Managers of the National Home. On March 18, 1929, pursuant to a resolution of the Board of Managers of the same date (Report of the Board of Managers for the fiscal year ended June 30, 1929, House Document No. 203, 71st Cong., 2d Sess., p. 34), the lease was accepted on behalf of the Board by its President.

By Act of March 17, 1930 (c. 106, Laws of New York, 1930), the Commissioners of the New York Land Office were authorized to extend the term of the lease, without rental or charge, for a term not exceeding forty years, or to execute a new lease for a term not exceeding fifty years, upon the same conditions as were contained in the original lease. On June 6, 1930, the Board of Managers voted to accept a forty-year extension of the lease (Report of the Board of Managers for the fiscal year ended June 30, 1930, House Document No. 546, 71st Cong., 3d Sess., p. 47), and on June 27, 1930, the State of New York issued its letters patent extending the term for forty years upon the conditions stated.

Pursuant to a resolution of the Board of Managers of March 18, 1929, the camp at Bath was, on May 1, 1929, established as the Bath Branch of the National Home for Disabled Volunteer Soldiers, and has since been so maintained. Appropriations for the maintenance of the Bath Branch, totaling \$1,234,300, were made in the Second Deficiency Act of March 4, 1929, c. 707, 45 Stat. 1668,¹ the Urgent Deficiencies Act of March 26, 1930 (c. 92, 46 Stat. 90, 123), the War Department Appropriations Act of May 28, 1930 (c. 348, 46 Stat. 432, 466), the Deficiency Appropriations Act of July 3, 1930 (c. 846, 46 Stat. 860, 911), and the Second Deficiency Act of March 4, 1931 (c. 522, 46 Stat. 1552, 1557). The action of the Board of Managers in executing the lease was reported to Congress in the Annual Report of the Board of Managers for the fiscal year ended June 30, 1929 (House Document No. 203, 71st Cong., 2d Sess., pp. V., 34), and its action in accepting the extension of the lease was reported to Congress in the Annual Report of the Board for the year ended June 30, 1930 (House Document No. 546, 71st Cong., 3d Sess., p. 47).

By the Act of July 3, 1930 (c. 863, 46 Stat. 1016), Congress provided:

"(a) That the President is authorized, by Executive order, to consolidate and coordinate any hospitals and executive and administrative bureaus, agencies, or offices, especially created for or concerned in the administration of the laws relating to the relief and other benefits provided by law for former members of the Military and Naval establishments of the United States, including * * * the National Home for Disabled Volunteer Soldiers, * * * into an establishment to be known as the Veterans' Administration, * * *.

¹ This Act contained the following appropriation:

"Bath Home, Bath, New York: For current expenses, subsistence, household, hospital, transportation, repairs, and farm, * * *, for the camp for veterans at Bath, New York, *leased by the State of New York to the Board of General Managers of the National Home for Disabled Volunteer Soldiers*, \$500,000, fiscal year 1929, and to remain available until June 30, 1930." (Italics supplied.)

Although the lease in question was executed by the State of New York under date of February 26, 1929, it was not accepted by the Board of Managers of the National Home for Disabled Volunteer Soldiers until March 18, 1929. The first appropriation for the maintenance of the Bath Branch of the Home thus took express cognizance of the proposed lease and actually antedated the acceptance thereof by the Board of Managers.

"SEC. 2. * * * Upon the establishment of such Veterans' Administration all the functions, powers, and duties now conferred by law upon * * * the Board of Managers of the National Home for Disabled Volunteer Soldiers, * * * are hereby conferred upon and vested in the Administrator of Veterans' Affairs.

"SEC. 3. All property the title of which now stands in the name of the Board of Managers of the National Home for Disabled Volunteer Soldiers is hereby transferred to and the title thereof vested in the United States. * * *

* * * * *

"SEC. 5. (a) When the consolidation and coordination herein provided for shall have been effected in the Veterans' Administration the President shall so declare by proclamation or order, whereupon the corporation known as the National Home for Disabled Volunteer Soldiers and the Board of Managers shall cease to exist.

"(b) All contracts and other valid and subsisting obligations of the corporation, the National Home for Disabled Volunteer Soldiers, shall continue and be and become obligations of the United States, and the United States shall be considered as substituted for said corporation with respect to all such demands either by or against said corporation, unless and until they shall thereafter be superseded or discharged according to law. * * *

In one of the legal opinions accompanying your letter of April 29, 1931, the conclusion is reached that the *lease* was valid but that the forty-year *extension of the lease* was invalid, since the extension was accepted on behalf of the Board of Managers at a meeting at which only four members of the Board were present (see Report of the Board of Managers for the fiscal year ended June 30, 1930, House Document No. 546, 71st Cong., 3d Sess., pp. 45-47), which number, the opinion states, was less than the quorum of "six" members prescribed by section 4827 of the Revised Statutes (U. S. C., Title 24, sec. 74). If this objection to the validity of the action of the Board were well-taken, it would apply equally to the original lease, since the execution of that document was authorized at a meeting of the Board at which only *five* members were present. (Report of the

Board of Managers for the fiscal year ended June 30, 1929, House Document No. 203, 71st Cong., 2d Sess., pp. 32-34.) As a matter of fact, the author of the opinion referred to, having apparently been misled by an error in the compilation of section 74, Title 24, of the United States Code, overlooked the Joint Resolution of October 19, 1914, No. 49 (38 Stat. 780), which provides, with respect to the Board of Managers of the National Home for Disabled Volunteer Soldiers, that:

"Said board, after the passage of this resolution, shall be composed of seven members, and four members shall constitute a quorum for the transaction of business at any regular or special meeting thereof."

This Joint Resolution appears never to have been repealed or superseded, and, accordingly, it seems clear that the execution of the lease and extension by the Board of Managers was duly authorized by the Board.

Turning to the main questions involved on the facts above set forth, it is contended, on the one hand, that the National Home for Disabled Volunteer Soldiers, while a corporation, was really a governmental agency operated by appropriations of public funds, and that the obligations of the Board were in effect obligations of the United States, and the act of the Board in entering into this lease was void for the reason that it purported to commit the Board, and therefore the United States, to an obligation to maintain the Home for the full term of the lease, and thus to involve the Government in an obligation for the future disbursement of money in excess of amounts appropriated by Congress. The statutes referred to are as follows:

"No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year." (R. S., sec. 3732; June 12, 1906, c. 3078, 34 Stat. 255; U. S. C., Title 41, sec. 11.)

"No Executive Department or other Government establishment of the United States shall expend, in any one fiscal

year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law. * * * " (Act of February 27, 1906, c. 510, 34 Stat. 49.)

See *Smoot v. United States*, 38 Ct. Cls. 418; *Chase v. United States*, 44 Fed. 732; *Bradley v. United States*, 98 U. S. 104; *Chase v. United States*, 155 U. S. 489; *Leiter v. United States*, 271 U. S. 204.

The contrary argument advanced is that the National Home for Disabled Volunteer Soldiers is a corporation organized under Act of Congress and that it has corporate power to make contracts and incur contractual liabilities in its own name, and can lawfully enter into any contracts with respect to matters within the scope of its corporate power, and that it has corporate power to sue and be sued, to receive and hold donations of properties for its sole and exclusive use, and to procure from time to time, at suitable places, sites for its military homes. *National Home for Disabled Volunteer Soldiers v. Parrish*, 229 U. S. 494; 35 Op. 490, 492; *In re O'Connor*, 37 Wisc. 379; *Mallory v. Wheeler*, 151 Wisc. 136; *Lyle v. National Home for Disabled Volunteer Soldiers*, 170 Fed. 842. Cf. *Merchant Fleet Corporation v. Harwood*, 281 U. S. 519; *United States v. Strang*, 254 U. S. 491; *Chase National Bank v. Merchant Fleet Corporation*, 294 Fed. 641 (Certiorari denied, 264 U. S. 586).

Based on these contentions the argument is made that the obligation assumed by the Board of Managers under this lease, if an obligation of the United States, was an obligation "authorized by law" within the meaning of the statute above referred to, which prohibits involving the Government in any obligation for the future payment of money in excess of appropriations "unless such contract or obligation is authorized by law." If that interpretation of the statute is rejected, it is contended that the obligation created by this lease may have been an obligation of the Board of Managers alone and not an obligation of the United States, or at least was an obligation both of the Board and of the United States, in which case if the effort to obligate the United States was ineffective and void there still remained the valid

obligation of the Board which was taken over by the Act transferring contracts and obligations of the Board to the Veterans' Bureau.

I am of the opinion that both of these arguments are beside the mark. They both proceed on the assumption that by the terms of the lease a definite personal obligation was imposed on the lessee which bound it for the full term of the lease to maintain the property as a home for disabled veterans, an obligation the breach of which would subject the lessee to a money claim for breach of covenant. This assumption does not appear to be justified. There is no express personal covenant in the lease on the part of the lessee to maintain the property as a home for disabled veterans. The lease merely provides that it is made without rental or charge but "on condition" that such camp shall be maintained by the lessee during the term of the lease as a home for veterans. There is no basis in my opinion for the assumption which has been made that there was any intention on the part of the lessor or lessee to subject the lessee to a personal claim for failure to perform this condition. The terms of the lease and the conditions under which it was executed show that the parties intended nothing more than that in case of failure of the lessee to perform the condition the property, together with the right to occupy and use it, would revert to the State of New York. The lessee is bound, so long as it remains in possession under the lease, to maintain the property as a home for the veterans, but it is at liberty at any time to cease to so maintain it and in that case to surrender possession to the State of New York. Failure to perform the condition does not leave the lessee subject to any obligation. The effect of the transaction was to give the lessee the right to occupy and use the premises as a home for veterans as long as it saw fit to do so, not beyond the term specified, and gave the State of New York the right to resume possession and use of the property at any time the lessee failed to perform the condition. So long as Congress continues to appropriate money for the maintenance of the home and thus authorizes compliance with the condition in the lease the United States may retain possession. It is thus apparent that no obligation was created for the future pay-

ment of money in excess of appropriations made from time to time by Congress, and that no contract or obligation was undertaken by the Board in violation of the statutes above set forth. Material in support of this construction of the lease is found in negotiations leading up to its execution. Under date of February 23, 1929, the Attorney General of the State of New York wired the Chief Coordinator in care of the Veterans' Hospital at Bath, New York, as follows:

"In my opinion we can make lease to you for a term of years with the provision that premises be used as camp or home for veterans during time of lease STOP If desired lease can contain provision authorizing the United States to denounce lease at its pleasure and in my opinion the rights of veterans in the home must be subject to reasonable rules and regulations similar to those now in force STOP Upon advice that Department of Justice approves such lease we will be glad to have same prepared I am authorized to say that this meets the approval of the Governor and Adjutant General."

On the same day the Veterans' Bureau replied as follows:

"Please prepare lease on Bath home in accordance with your opinion in radio today STOP This will be submitted to Department of Justice and advice forwarded."

This interchange shows expressly that it was the intention that the United States might "denounce" the lease at its pleasure and the instructions were to prepare a lease to express that understanding. If the lease as drawn did not accomplish that result it is subject to reformation. Furthermore, while the Board of Managers of the National Home for Disabled Volunteer Soldiers had authority to receive private donations, its operations were supported largely by appropriations from the Federal Treasury. It had no funds available to satisfy an obligation to maintain this property for ten or forty years in the absence of appropriations by Congress. It is inconceivable that the Board could have intended in making this lease or entering into the extension of the lease to undertake an inescapable obligation to maintain this property for a long term of years, without any assurance that Congress would appropriate the money for it, and it is not reasonable to suppose that the

Board would have attempted to commit the Congress to provide for the maintenance of the property for such a long period, or that the State of New York intended to exact such a commitment. These considerations lead, I think, inevitably to the conclusion that the parties to the lease did not intend to impose such an obligation, and that the condition in the lease respecting the use of the property by the lessee was intended merely to enable the State of New York to resume possession if the conditions were not complied with, and not to create an obligation on the part of the lessee, breach of which would subject it to a claim for damages.

A further significant circumstance in support of these conclusions is found in the fact that while the lease was dated February 26, 1929, it was not approved by the Board of Managers until March 18, 1929, and meanwhile on March 4, 1929, in the Second Deficiency Act of that date (c. 707, 45 Stat. 1668), Congress appropriated \$500,000 for the fiscal year 1929, to remain available until June 30, 1930, for the maintenance of the camp for veterans at Bath. It thus appears that the Board of Managers withheld acceptance of the lease until it had an appropriation available for the first year of operation. The parties must have had in mind that the Board could not discharge an obligation to maintain the property without appropriations from Congress, and that the performance of the condition in the lease for the maintenance of the property as a veterans' home during the term of the lease was wholly dependent on the will of Congress. In determining whether a provision in a lease or deed is a condition (either precedent or subsequent) or a covenant, the controlling factor is the intention of the parties as determined from the entire instrument. *Kew v. Trainor*, 150 Ill. 150, 156; *Henry v. Bottling Company*, 277 Mo. 508, 513; *Graves v. Deterling*, 120 N. Y. 447, 455; *Langley v. Ross*, 55 Mich. 163, 165-166.

In *Henry v. Bottling Company*, *supra*, which involved a perpetual lease without rent, the court said (p. 513):

"Much difficulty has been encountered in the attempt to frame arbitrary rules for the classification of conditions and covenants. It is now generally conceded that the safest and

most satisfactory course is to ascertain as near as can be done, the intention of the parties from the instrument they have executed, and then give it such a construction as will best effectuate that intention."

The entry of the lessee into possession and the expenditure of public moneys in the operation, maintenance, and repair of the property, developed an adequate consideration for what amounted to the grant by the State of New York of an option to the lessee to remain in possession as long as the lessee chose to do so.

I am of the opinion, therefore, that while the lease did not create any obligation upon the lessee it did give the lessee the right to remain in possession of the property so long as the Congress should see fit to appropriate funds to maintain it, not beyond the extended term specified, and that whether or not this right belonged to the United States prior to the Act of July 3, 1930, by virtue of the fact that the National Home for Disabled Volunteer Soldiers was a governmental agency, that Act has operated to vest all the rights of the lessee in the United States.

Respectfully,

WILLIAM D. MITCHELL.

To the ADMINISTRATOR OF VETERANS' AFFAIRS.

CIVIL SERVICE RETIREMENT ACT—CASE OF
MRS. KATHERINE A. GAINES

Section 6 of the Act of May 29, 1930 (46 Stat. 468, 472), providing disability retirement for employees having served five years, is not to be interpreted as authorizing the retirement of Mrs. Katherine A. Gaines, who entered the civil service of the United States in 1917 and continued in such service for nearly thirteen years, but whose service with the Government was terminated prior to the passage of said Act, *supra*.

DEPARTMENT OF JUSTICE,
December 8, 1931.

SIR: I have the honor to comply with your request of April 16, 1931, for my opinion concerning the proper construction to be placed upon section 6 of the Act of May 29, 1930, c. 349, 46 Stat. 468, 472, as applied to the case of Mrs.

Katherine A. Gaines, who entered the civil service of the United States in 1917 and resigned on March 7, 1930, having served nearly thirteen years. The pertinent language of the section is copied below:

"SEC. 6. Any employee to whom this Act applies who shall have served for a total period of not less than five years, and who, before becoming eligible for retirement under the conditions defined in the preceding sections hereof, becomes totally disabled for useful and efficient service in the grade or class of position occupied by the employee, by reason of disease or injury not due to vicious habits, intemperance, or willful misconduct on the part of the employee, shall upon his own application or upon the request or order of the head of the department, branch, or independent office concerned, be retired on an annuity computed in accordance with the provisions of section 4 hereof: * * * No claim shall be allowed under the provisions of this section unless the application for retirement shall have been executed prior to the applicant's separation from the service or within six months thereafter: *Provided*, That any employee who heretofore has failed to file an application for retirement within six months after separation from the service, may file such application within three months after the effective date of this Act. * * *

A corresponding paragraph of the original Retirement Act, approved May 22, 1920, c. 195, 41 Stat. 614, 616 (U. S. C., Title 5, sec 710), provided in the following language for disability retirement after fifteen years of service.

"SEC. 5. That any employee to whom this Act applies who shall have served for a total period of not less than fifteen years, and who, before reaching the retirement age as fixed in section 1 hereof, becomes totally disabled for useful and efficient service by reason of disease or injury not due to vicious habits, intemperance, or willful misconduct on the part of the employee, shall upon his or her own application or upon the request or order of the head of the department, branch, or independent office concerned, be retired, on an annuity under the provisions of section 2 hereof. * * *

The entire statute was revised and reenacted by the Act of July 3, 1926, c. 801, 44 Stat. 904, 907, and again by the Act of May 29, 1930, *supra*. In the 1926 revision there was

added the proviso requiring applications to be filed prior to the applicant's separation from the service or within six months thereafter. In 1930 the required period of service was reduced from fifteen years to five years and it was provided "that any employee who heretofore has failed to file an application for retirement within six months after separation from the service, may file such application within three months after the effective date of this Act." Aside from these changes the paragraph of the 1930 Act employs the identical language of the 1926 Act and differs from that of the 1920 Act only in minor and immaterial particulars of phraseology.

After passage of the original Act many applications for disability retirement were filed by persons who had served for fifteen years or more but had resigned before the Act became effective and in some instances had been out of the service for many years. It appears from inquiries at your Department and from an examination of administrative decisions rendered in various cases that all such applications were denied upon the ground that the statute did not authorize the retirement of persons whose employment had been terminated before the legislation became effective. Attorney General Palmer appears to have accepted that view when deciding that a duly granted leave of absence without pay, although continuing for a period exceeding one year, had not terminated the services of an employee so as to deprive him of the right to retirement because of disability (32 Op. 424)—a question unnecessary to consider if separation from the service would not have deprived the employee of the right. Consequent upon the interpretation adopted, and indicating an acceptance of the principle, the President forbade the reinstatement of former employees for the purpose of conferring upon them the benefits of the Act. (Civil Service Rule IX, par. 1a.)

The provision in the 1930 Act for the retirement in event of total disability of "any employee * * * who shall have served for a total period of * * * *five* years" was new legislation. It was couched in language which previously had acquired an accepted meaning and must now be similarly understood, that is, as excluding persons who had

ceased to be employees prior to its enactment. *United States v. G. Falk & Brother*, 204 U. S. 143, 192.

The applicant urges, however, that her case comes within the language of the proviso authorizing the filing of an application within three months after the effective date of the Act by "any employee who heretofore has failed to file an application for retirement within six months after separation from the service." Concerning the purpose of this proviso, the following statements were made in the Senate and in the House of Representatives by members of a joint committee of conferees, upon whose recommendation it was inserted as an amendment to the bill:

"The present law prohibits the consideration of certain claims for disability retirement unless made while the employee is in the service, or within six months thereafter. An amendment permits any employee who has failed to file such a claim to file it within three months after the passage of the pending bill." (Statement of Senate conferee, Cong. Rec., v. 72, pt. 9, p. 9549.)

"Persons entitled to disability retirement are required to make application therefor within six months after the applicant's separation from the service. This amendment permits such employees who have heretofore failed to make such application within six months to do so within three months of the effective date of this act." (Report of House conferees, Cong. Rec., v. 72, pt. 9, p. 9307.)

These explanations, as well as the language of the proviso, appear to contemplate the filing of applications by persons who had been authorized to file them but had failed to do so. No statute had authorized Mrs. Gaines to file an application and it cannot properly be said that she had "failed" to do that which she never could have done with any semblance of validity. To construe the proviso so as to comprehend her case would be to give it a retrospective application without apparent limitation, and, I think, we may confidently assume that an intention to effect so wide a departure from the policy theretofore established would have been evidenced by language much more appropriate to accomplish it.

Mrs. Gaines' case presents appealing equities because she served so long and was separated from the service so short a time before the effective date of the 1930 Act, but if the

law were construed to apply to her case it would apply to cases of employees who served little more than five years and who were separated from the service long before the passage of the 1930 Act. If the Act were applied to such cases it would not only place such persons on the pension list but would entitle them to back pay computed from the date of their separation from the service.

On the basis of mere implications, without express provision to that effect, we cannot conclude that Congress intended to resurrect such cases and make such grants to persons long separated from the service and who, at the time of leaving, had no idea they ever would receive annuities. Under all this legislation the rights of employees have been fixed as of the date of their separation from the service. The proviso allowing filing of applications within three months after the effective date of the Act does not purport to create or define the right to annuities. Other provisions of the Act must be looked to to ascertain whether it was intended to grant annuities to those previously separated from the service who were not entitled to annuities under the law in force at the time of their withdrawal from the service, and there is nothing in any of the other provisions of the Act to sustain the contention that such was its purpose.

A careful search of the proceedings in Congress connected with the passage of this legislation has failed to develop anything to suggest that the Congress intended this Act to be retroactive in the sense contended for. While the bill was pending, a question did arise as to whether the Act would operate to increase the annuities of those retired employees then on the rolls and, to make it clear that such increases were to be granted and that those who had become entitled to annuities under the previous statute should not thereafter be limited to annuities computed on the old basis, section 8 of the Act of 1930 was inserted. It read as follows:

"In the case of those who before the effective date of this Act shall have been retired on annuity under the provisions of the Act of May 22, 1920, or said Act as amended, or as extended by Executive order, the annuity shall be computed, adjusted, and paid under the provisions of this Act, but this Act shall not be so construed as to reduce the annuity of any

person retired before its effective date, nor shall any increase in annuity commence before such effective date."

Congress thought it necessary to insert an express provision to make the Act retroactive even to such a slight degree. If there had been any purpose to go so far as to grant annuities to those previously separated from the service under conditions not entitling them to any annuity, no doubt express provision to that effect would have been made.

I see no escape from the conclusion reached in this case by the Commissioner of Pensions and by you on the appeal.

I must conclude, therefore, that section 6 of the Act of May 29, 1930, is not to be interpreted as authorizing the retirement of Mrs. Katherine A. Gaines, whose service with the United States was terminated prior to its passage.

Respectfully,

WILLIAM D. MITCHELL.

To the ADMINISTRATOR OF VETERANS' AFFAIRS.

APPLICATION FOR PATENT TO LODE MINING CLAIM ON
MOLATE ISLAND, CALIFORNIA

The location of the mining claim by Arthur B. Riehl and Louis H. Eilkin, described herein, and covering all but a small part of Molate Island, San Francisco Bay, California, having been duly made at a time when the island was not reserved for lighthouse purposes or for any other public purposes, was a valid and effective location under the mineral land laws; and the location having been duly made and maintained, no legal basis exists for denying to the claimants a patent.

Neither Executive Order No. 4099, of November 7, 1924, which purports to reserve Molate Island "for the use of the Department of Commerce for lighthouse purposes," nor the occupation of a small portion of the island by the Department of Commerce in 1925, operated to divest the claimants of any rights in that part of the island covered by the location which had accrued prior to that time.

DEPARTMENT OF JUSTICE,
December 11, 1931.

SIR: I have the honor to comply with your request of October 27, 1931, for my opinion whether the issuance of a patent to a lode mining claim now pending in your Department, and covering all but a small part of Molate Island, San Francisco Bay, California, is warranted or required.

You state that your request is made with the approval of the Secretary of Commerce, who is protesting against the issuance of the patent upon the ground that Molate Island was withdrawn from the public domain for lighthouse purposes prior to the location of the mining claim in question.

The facts, as taken from the memorandum of the Solicitor of your Department accompanying your letter, and from official records, are as follows:

Molate Island, situated in San Francisco Bay and within Section 17, Township 1 north, Range 5 west, Mount Diablo Meridian, was set apart as a military reservation by an Executive Order dated October 21, 1882. On April 23, 1917, while the island was still occupying the status of a military reservation, the Secretary of War issued to the Department of Commerce "a license revocable at will by the Secretary of War, to occupy and use for lighthouse purposes the south half of the Molate Island Military Reservation." On March 3, 1923, this license was extended to include the entire reservation.

On August 4, 1923, the Acting Secretary of War advised the Secretary of the Interior that on that day he had submitted to the President for approval the draft of an Executive Order which would place under the latter's control certain military reservations, including the Molate Island Reservation, "which are no longer required for military purposes and the transfer of which is authorized by the Act of July 5, 1884 (23 Stat. 103)." This letter referred to the licenses which had been issued to the Department of Commerce, and stated that "with reference to section 5 of the Act of July 5, 1884, * * * there has been discovered on the Island a vein of manganese ore * * * which is said to be of considerable value." The letter further stated that "at the present time there are no improvements of any kind on the island * * *." On the same day, August 4, 1923, the Acting Secretary of War advised the Secretary of Commerce of the request for the proposed Executive Order and stated that:

"The Secretary of the Interior will be informed of this outstanding permit (the license to the Department of Commerce) in order that the interests of your Department may be properly protected."

On August 13, 1923, Executive Order No. 3893, issued "under the authority of section 1 of the Act of July 5, 1884," directed that certain military reservations therein described, including the Molate Island Reservation, "having become useless for military purposes be and are hereby placed under the control of the Secretary of the Interior for disposition as provided in the above Act or as may be otherwise provided by law."

On October 7, 1923, Arthur B. Riehl and Louis H. Eilkin perfected a location under the mining laws, based on discoveries of manganese in vein formation, covering 5.783 acre sof Molate Island's total area of about 6.774 acres. This location was based upon adequate discovery and was made in compliance with all requirements of the mining laws.

Under date of November 12, 1923, the Acting Secretary of Commerce wrote a letter to the Secretary of the Interior referring to Executive Order No. 3893, of August 13, 1923, and requesting the Secretary of the Interior to secure an Executive Order reserving Molate Island for lighthouse purposes. On November 7, 1924, Executive Order No. 4099 directed that Molate Island be "withdrawn under the provisions of the Act of June 25, 1910, (36 Stat. 847), as amended by the Act of August 24, 1912, (37 Stat. 497), for the use of the Department of Commerce for lighthouse purposes."

Although plans for the use of the island by the Department of Commerce for lighthouse purposes were said to have been made at an earlier date, possession of the island was not taken by the Department of Commerce under the licenses granted by the Secretary of War, and no use was made thereof, until some time in 1925, when a fog signal, occupying an area of about twenty-five square feet, was erected on the extreme southern portion of the island.

On February 7, 1927, an application was made to the Secretary of the Interior for a patent based upon the Riehl and Eilkin location of October 7, 1923. The Commissioner of the General Land Office has found this application to be regular in all respects and sufficient to warrant the issue of the final certificate. Whether or not you are required to issue this patent is the question which you have submitted.

The Act of July 5, 1884, c. 214, 23 Stat. 103 (U. S. C., Title 43, Secs. 1071-1074), provides in part:

" * * * That whenever, in the opinion of the President of the United States, the lands, or any portion of them, included within the limits of any military reservation heretofore or hereafter declared, have become or shall become useless for military purposes, he shall cause the same or so much thereof as he may designate, to be placed under the control of the Secretary of the Interior for disposition as hereinafter provided, * * * .

* * * * *

" SEC. 5. Whenever any lands containing valuable mineral deposits shall be vacated by the reduction or abandonment of any military reservation under the provisions of this act, the same shall be disposed of exclusively under the mineral land laws of the United States."

Executive Order No. 3893, of August 13, 1923, which terminated the Molate Island Military Reservation and placed the island under control of the Secretary of the Interior, was issued under the authority of the Act of July 5, 1884. Under Section 5 of that Act the island, which contained "valuable mineral deposits," then became subject to disposition "exclusively under the mineral land laws." It was while the island was occupying this status that the location of October 7, 1923, was perfected.

When the location of a mining claim is perfected under the law it has the effect of a grant by the United States of the right of present and exclusive possession. *Wilbur v. Krushnic*, 280 U. S. 306, 316-317. This right, if validly maintained, entitles the owner in due course to a patent. The location in the instant case appears to have been made and maintained in full compliance with the mining laws. It necessarily follows that the claimants Riehl and Eilkin are entitled to the patent they are seeking unless, notwithstanding Executive Order No. 3893, the licenses granted to the Department of Commerce by the Secretary of War, prior to the date of that order, had the effect of reserving the island for lighthouse purposes so as to preclude appropriation thereof under the mineral land laws. I am clearly of the opinion that the licenses to the Department of Commerce did not have that effect.

Some confusion exists as to whether the President or an executive department has power to transfer from one executive department to another public lands which have been reserved for the use of an executive department and thereby withdrawn from the operation of the Public Land Laws. See 28 Op. 143; 32 Op. 488, 490; 33 Op. 436. I assume that the President immediately after making the Executive order of August 13, 1923, terminating the reservation of Molate Island for military purposes and placing it under the control of the Secretary of the Interior under the Act of July 5, 1884, could have made another Executive order, before any intervening rights attached, setting the island apart as a reservation for use by the Department of Commerce for lighthouse purposes, and a plausible argument may be made that the President could have accomplished the same result in substance by an order transferring the reservation from the War Department to the Department of Commerce. 33 Op. 436. It may also be assumed, for the purpose of this opinion, that the act of the Secretary of War in granting a revocable license to the Commerce Department was authorized or directed by the President. See *Wilcox v. Jackson*, 13 Pet. 498, 512; *United States v. Midwest Oil Company*, 236 U. S. 459; *Chicago, etc., Railway Company v. United States*, 244 U. S. 351, 357. But with all these assumptions the fact remains that the granting of a revocable license by the Secretary of War to the Department of Commerce was not intended to and did not amount to a transfer of the reservation from one Department to another, and was not intended as and was not equivalent to a presidential order terminating the military reservation, followed immediately by another presidential order reserving the Island to the Department of Commerce.

I know of no general statute authorizing the Secretary of War to grant such licenses, but it has long been the practice to grant them, and the long-continued exercise of this power with the tacit assent of Congress justifies the conclusion that the power exists, but such licenses are not definite or permanent relinquishments of the property. They are mere permits for the use of the property so long as the Secretary of War does not require them for military purposes. They

are not intended to give and do not give the licensee any rights to the use of the property after the War Department itself has lost the right to use it for military purposes. Clearly the Secretary of War had no power by granting a revocable license to the Department of Commerce to prevent the President from terminating the military reservation and restoring the land to the public domain as was done by the Executive order of August 13, 1923.

It is my opinion that upon the issuance of Executive Order No. 3893 of August 13, 1923, the licenses from the Secretary of War to the Department of Commerce were automatically terminated. It follows that the location of October 7, 1923, having been duly made at a time when the island was not reserved for lighthouse purposes or for any other public purposes, was a valid and effective location under the mineral land laws. The location having been duly made and maintained, I can find no legal basis for denying to the claimants a patent.

Neither Executive Order No. 4099, of November 7, 1924, which purported to reserve Molate Island "for the use of the Department of Commerce for lighthouse purposes," nor the occupation of a small portion of the island by the Department of Commerce in 1925, operated to divest the claimants of any rights in that part of the island covered by the location which had accrued prior to that time. See *Wilbur v. Krushnic*, 280 U. S. 306; *Clipper Mining Co. v. Eli Mining & Land Co.*, 194 U. S. 220, 226-227; 17 Op. 230.

Respectfully,

WILLIAM D. MITCHELL

To the SECRETARY OF THE INTERIOR.

REVOCATION OF AN ERRONEOUS REAPPRAISAL OF LAND
WITHIN FORT PECK (MONTANA) INDIAN RESERVATION

A final certificate was issued to one Alexander Miller pursuant to his entry on land situate in the Fort Peck (Montana) Indian Reservation. The land had been appraised at \$6.00 per acre and payment therefor was made in accordance with such appraisal. Thereafter the land was reappraised at \$3.50 per acre and Miller was allowed a refund on that basis. Before the patent issued, it was discovered that the reappraisal had been secured by fraud and a second reappraisal was made establishing the fact that the land was worth \$6.00 per acre. *Held*, that the second reappraisal was within the lawful authority of the Secretary of the Interior and that the entryman Miller may lawfully be required to pay for the land at \$6.00 per acre.

DEPARTMENT OF JUSTICE,
December 30, 1931.

SIR: I have the honor to acknowledge receipt of your letters of October 22 and November 12, 1931, together with enclosures, in which you request my opinion as to whether you have the right to collect from one Alexander Miller a sum additional to the amount that the latter has already paid in return for a final certificate issued to him pursuant to his entry on land situate in the Fort Peck (Montana) Indian Reservation.

The entry was made under the Act of May 30, 1908 (35 Stat. 558), and was allowed on March 22, 1916. Final proof was made on September 15, 1920; but the final certificate was withheld until payment of the deferred installments of the purchase price. The land was originally appraised at \$6.00 per acre, and the entry and final proof were made on that basis. On December 24, 1925, Miller applied for a reappraisal. On October 25, 1928, he paid the last installment of the amount due on the basis of the original appraisal; but on November 10, 1928, the Department approved a recommendation of the Commissioner of Indian Affairs that the land be reappraised under the Act of June 6, 1912 (37 Stat. 125). Upon reappraisal its value was fixed at \$3.50 an acre. On this basis, Miller was entitled to a refund, which was made, and the final certificate issued on December 6, 1928.

Subsequently an investigation revealed that a Government employee, upon whose report that the land was worth only \$3.50 per acre the land was reappraised, was bribed by various entrymen, and that the land was in truth worth \$6.00 an acre. Miller was not found to have been a party to the fraud. The Commissioner of Indian Affairs advised that the reappraisal of Miller's land be vacated together with that of 44 other entrymen, and the original appraisals left undisturbed. This was done on August 21, 1930; and on October 24, 1930, the Commissioner of the General Land Office notified Miller that he would have to pay the difference with interest or suffer cancellation of his entry. From this order Miller appealed to the Department.

The statute involved reads as follows (Act of June 6, 1912, 37 Stat. 125) :

"* * * That the Secretary of the Interior be, and he is hereby, authorized to cause to be classified or reclassified and appraised or reappraised, in such manner as he may deem advisable, the unallotted or otherwise unreserved lands within any Indian reservation opened to settlement and entry but not classified and appraised in the manner provided for in the Act or Acts opening such reservations to settlement and entry, or where the existing classification or appraisement is, in the opinion of the Secretary of the Interior, erroneous."

Under this statute the Secretary may reappraise the land in question if the existing appraisal is, in his opinion, erroneous. In this case you have found that the appraisal of November 10, 1928, was erroneous. You were accordingly authorized to reappraise Miller's lands. Your authority to reappraise is not exhausted by the erroneous reappraisal procured by bribery but is predicated by the statute upon your conclusion that any existing appraisal is erroneous. Cf. *Knight v. Land Association*, 142 U. S. 161, and *Lane v. Darlington*, 249 U. S. 331.

This view finds support in the general rule that the control of the Secretary of the Interior over the administration of the public lands continues until the issuance of the patent. The rule was stated in a decision of the Interior Department as follows (*In re Brady*, 27 L. D. 716) :

"The control of the Commissioner of the General Land Office, and of the Secretary of the Interior, over the title to public land does not cease upon the issuance of final certificate; nor does the party to whom such certificate issues secure thereby such a vested right in the land as to preclude these officers from correcting, or canceling the same for error of law or fact."

To the same general effect see *Smith v. Custer*, 8 L. D. 269; *United States v. Bailey*, 17 L. D. 468; *Bender v. Shimer*, 19 L. D. 363; *In re Hyde*, 33 L. D. 639; *Heirs of Ewing v. Cayton*, 36 L. D. 474.

In *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, the Supreme Court said (p. 593):

"* * * wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the Government until the issue of the patent, * * * and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost.

"* * * This jurisdiction of the department has been maintained in cases of preemption where the entire purchase money has been paid and a receiver's final certificate issued."

See also *Knight v. Land Association*, 142 U. S. 161; *Parsons v. Venzke*, 164 U. S. 89; *Orchard v. Alexander*, 157 U. S. 372; *United States v. Steenerson*, 50 Fed. 504; *Moses v. Long-Bell Lumber Co.*, 206 Fed. 51; *Swigart v. Walker*, 30 Pac. (Kan.) 162.

It is quite apparent from these decisions that the issuance of a final certificate does not prevent inquiry by the Secretary of the Interior to ascertain whether the rights of the United States have been fully protected. Until patent issues, the Secretary has the power, and it is his duty, to see that the interests of the Government in the public lands placed in his hands for administration are properly protected.

In this case it was discovered before the patent issued that the first reappraisal had been secured by fraud in that the agent recommending it had been bribed by various entrymen to report favorably on their applications for reap-

praisal. Thus it became apparent that the interests of the United States had not been protected and that the duty which the Government owed its Indian wards in the disposal of their lands had not been properly performed. Therefore, it was not only within your power, but it was your duty, to examine into the proceedings and correct the wrong that had been done.

It is true that Miller was not concerned in the fraud. But from the fraud he received a benefit which he is not entitled to retain against your assertion of the right to correct the fraudulent and erroneous appraisal.

This conclusion is supported by the cases. In *New Orleans v. Paine*, 147 U. S. 261, an officer of the Land Department was about to relocate the boundaries of a land grant. An injunction was sought on the theory that a former survey of the same line had been examined, approved, and paid for, and that the rights of the plaintiff to the lands included in such survey had become vested. The Supreme Court said (p. 266):

"If the department was not satisfied with this survey, there was no rule of law standing in the way of its ordering another. Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hearing."

In *Brown v. Hitchcock*, 173 U. S. 473, the Supreme Court said (pp. 476, 479):

"Until the legal title to public land passes from the Government, inquiry as to all equitable rights comes within the cognizance of the land department. * * *

"* * * The naked proposition upon which the plaintiff relies is that upon the creation of an equitable right or title * * * the power of the land department to inquire into the validity of that right or title ceases. That proposition cannot be sustained."

See also *Parcher v. Gillen*, 26 L. D. 34; *Aspen Consolidated Mining Co. v. Williams*, 27 L. D. 1; *In re State of Louisiana*, 33 L. D. 13; *Aztec Land and Cattle Co. v. Tomlin-*

son, 35 L. D. 161; *Beley v. Naphtaly*, 169 U. S. 353, 364; *Knight v. Lane*, 228 U. S. 6; *West v. Standard Oil Co.*, 278 U. S. 200, 210.

In my opinion the second reappraisal was within the lawful authority of the Secretary and the entryman Miller may lawfully be required to pay for the lands at \$6.00 per acre.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE INTERIOR.

**VALIDITY OF ORDER OF TREASURY DEPARTMENT FIXING
THE CLOSING HOUR OF THE PORT OF TIA JUANA**

The order of the Treasury Department of October 28, 1926, closing the Port of Tia Juana at 6.00 p. m., having for its object the enforcement of the customs laws against smuggling, is a reasonable and valid regulation under section 251 of the Revised Statutes, which has the force and effect of law, provided said order had the personal approval of the Secretary of the Treasury.

As such an order is a valid regulation having the force and effect of law, customs guards can legally detain persons who insist upon entering the United States after the port of Tia Juana has been closed.

DEPARTMENT OF JUSTICE,
February 3, 1932.

SIR: I have the honor to refer to your letter of November 21, 1931, complying with my request of October 9, 1931, for certain additional information necessary to enable me to reply to your earlier request for an opinion (1) as to the validity of an order of the Treasury Department of October 28, 1926, closing the port of Tia Juana at 6.00 p. m., and (2) as to the right of customs guards to detain persons who insist upon entering the United States after the port has been closed.

The facts as they appear from your letters and enclosures, so far as material here, are as follows:

Prior to February 27, 1924, the ports of Tia Juana and Calexico were closed to entry of all persons at midnight; subsequently, it was discovered that under the cover of darkness a brisk trade in smuggling had sprung up, particularly in the smuggling of aliens and prohibited articles such as liquor, narcotics, etc., and to abate this practice an order of

February 27, 1924, closing the ports of Tia Juana and Calexico at 9.00 p. m., was issued. On October 28, 1926, the closing hour at Tia Juana was advanced to 6.00 p. m. and the opening hour fixed at 8.00 a. m. Later, the opening hour was advanced to 6.00 a. m.

Your request is prompted by the fact that some have questioned the right of the Secretary of the Treasury to close the Mexican border, insisting that he has no authority to keep American citizens, without dutiable or contraband merchandise, from entering the United States at any hour of the day or night, and to enforce the closing of the border to the extent of denying them admission during certain hours, is an unwarranted interference with their rights as American citizens.

Section 582 of the Tariff Act of 1922, c. 356, 42 Stat. 858, 979 (U. S. C., Title 19, sec. 484), now section 582 of the Tariff Act of 1930, c. 497, 46 Stat. 590, 748 (U. S. C., Title 19, sec. 1582, Supplement), provided:

"The Secretary of the Treasury may prescribe regulations for the search of persons and baggage and he is authorized to employ female inspectors for the examination and search of persons of their own sex; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations."

Acting under the authority of this statute, the Secretary of the Treasury has promulgated regulations requiring customs inspectors to inspect the person and baggage of all persons coming into the United States from foreign countries. (Articles 1202 and 1203, Customs Regulations of 1923, amended to 1925.)

It is clear, therefore, that before anyone, including an American citizen, can enter the United States from a foreign country, he must first submit himself and his baggage to inspection by authorized officers or agents of the Government regardless of whether he has on his person or in his baggage dutiable or contraband merchandise. No one, not even an American citizen, can decide for himself that he has no dutiable or contraband merchandise on his person or in his baggage and without further ado enter the United States,

since to do so would make him, in plain violation of law, the inspector of his own person and baggage and the judge of his own qualifications to enter the United States.

Section 251 of the Revised Statutes (U. S. C., Title 19, sec. 66), provides:

"The Secretary of the Treasury shall * * * prescribe * * * rules and regulations, not inconsistent with law, to be used * * * in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports * * *; he shall give such directions to collectors and prescribe such rules * * * to be observed by them as may be necessary for the proper execution of the law * * *."

Reasonable regulations made by an executive department charged with the administration of a statute, and having the personal approval of the head of the department (35 Op. 15, 20-21), if not inconsistent with law, become a part of the law and have the same force and effect as if incorporated in the statute. *United States v. Morehead*, 243 U. S. 607; *United States v. Smull*, 236 U. S. 405; *Ex parte Reed*, 100 U. S. 13; *Wilkins v. United States*, 96 Fed. 837.

The Secretary is authorized under section 251 to maintain customs inspection service during such hours as in his judgment the character and extent of business may require. *International Railway Company v. Davidson*, 257 U. S. 506, 514-515, 273 Fed. 153, 155-156; *Butler v. White*, 83 Fed. 578, 581 (reversed on other grounds, *White v. Butler*, 171 U. S. 379); *Gallagher v. United States*, 1 Ct. Cust. Appls. 69; *Talbot v. United States*, 1 Ct. Cust. Appls. 415, 419; *Psaki Bros. v. United States*, 3 Ct. Cust. Appls. 479, 485.

However, the movement of traffic through the port of Tia Juana is sufficient, we understand, to warrant the Secretary in maintaining customs inspection service after 6.00 p. m. The question is, therefore, whether, notwithstanding this fact, the Secretary is authorized under section 251 to close the port of Tia Juana at 6.00 p. m. in order to enable him to enforce the customs laws against smuggling.

Here we have a conflict of public interests. On the one hand, public interest requires the Secretary to maintain customs inspection service at the port of Tia Juana after 6.00 p. m. in order to accommodate the many people, including

American citizens, who desire to enter the United States after that hour. On the other hand, public interest requires the Secretary to close the border at that hour to enable him to enforce the customs laws against smuggling. The orders of February 27, 1924, and October 28, 1926, constitute a construction of section 251 by the Secretary as authorizing him to determine which of these interests is of greater concern to the public, and having determined that the closing of the border in order to enable him to enforce the customs laws against smuggling is the greater, to issue an order to that effect.

It is well settled that the interpretation of a statute by an executive department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed by the courts unless clearly erroneous.

Viewing, in the light of this rule, the order of October 28, 1926, its object, and the conditions which prompted its issuance, it is my opinion that it is a reasonable and valid regulation under Section 251 of the Revised Statutes, having the force and effect of law, provided it had the personal approval of the Secretary. If it did not have such approval, as your letter of November 21, 1931, would seem to indicate, the issuance of a new order having the personal approval of the Secretary would seem to be advisable.

As such an order is a valid regulation having the force and effect of law, customs guards can legally detain persons who insist upon entering the United States after the port of Tia Juana has been closed.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE TREASURY.

CUSTOMS DUTIES—LEAD-BEARING ORES AND COPPER
MATTES

The duty which the Secretary of the Treasury is authorized to impose upon the lead contained in copper, gold and silver ores, or copper mattes, as enumerated in the proviso of par. 391 of the Tariff Act of 1930 (46 Stat. 628), must be based only upon the amount of lead actually recovered in smelting or refining.

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The former construction by the Secretary of the Treasury of the proviso to par. 392 of the Tariff Act of 1922 (42 Stat. 887), which now applies to par. 391 of the Tariff Act of 1930, *supra*, is erroneous in applying the duty on lead from copper matte in accordance with the assay estimate of the lead content thereof, and accordingly the Attorney General recommends that such construction in this respect be modified.

DEPARTMENT OF JUSTICE,
February 4, 1932.

SIR: I have the honor to reply to your letter of October 31, 1931, referring to your construction of the proviso to par. 392, Title I, of the Tariff Act of 1922, as set forth in your letter to the Collector of Customs, at New York, dated December 1, 1923, wherein you state that upon further consideration in connection with par. 391, Title I, of the Tariff Act of 1930, it is your opinion that your construction, which now applies to par. 391 of the Act of 1930, is erroneous. Since an application of this view would require a modification of your ruling giving construction to a law imposing customs duties, adverse to the United States, within the purview of sec. 502 (b), Title IV, of the Tariff Act of 1930 (c. 497, 46 Stat. 731; U. S. C., Title 19, sec. 1502 (b)), which requires that such rulings or decisions of the Secretary of the Treasury shall not be reversed or modified adversely to the United States, except in concurrence with an opinion of the Attorney General recommending such action, you request my opinion with a view to obtaining authority to modify your former construction.

Par. 392, Title I, of the Tariff Act of 1922 (c. 356, 42 Stat. 887; U. S. C., Title 19, sec. 121, par. 392) provides:

"Lead-bearing ores and mattes of all kinds, 1½ cents per pound on the lead contained therein: *Provided*, That such duty shall not be applied to the lead contained in copper mattes unless actually recovered: * * *."

Par. 391, Title I, of the Tariff Act of 1930 (c. 497, 46 Stat. 628; U. S. C., Title 19, sec. 1001, par. 391) provides:

"Lead-bearing ores, flue dust, and mattes of all kinds, 1½ cents per pound on the lead contained therein: *Provided*, That such duty shall not be applied to the lead contained in copper, gold, or silver ores, or copper mattes, unless actually recovered: * * *."

Your letter of December 1, 1923, construing the proviso in question states:

"The Department construes this proviso to mean that when there is a recovery of lead from copper matte, duty at the rate of $1\frac{1}{2}$ cents per pound should be assessed upon the lead content of such copper matte."

The duty on lead-bearing ores and mattes of all kinds enumerated in the first part of par. 392 of the Tariff Act of 1922, *supra*, is determined according to the percentage of lead contained therein as shown by the report of the Government assayer, after a proper assay of the sample of the ore or matte in question, taken according to commercial methods, is made. This figure reflects the amount of lead contained therein which is potentially recoverable. However, when smelted or refined by the usual commercial method the amount of lead actually recovered, for scientific reasons, is usually several points less than the assay estimate. Under your construction of the proviso to paragraph 392 of the Tariff Act of 1922, *supra*, which excepts the lead contained in copper matte from duty unless "actually recovered," if, for example, 70% of the lead content of a copper matte is recovered by smelting or refining and the Government assay showed a lead content of 10% of the matte, the duty would be imposed according to the assay estimate, thus according copper matte the same tariff treatment as other lead-bearing ores and mattes of all kinds, and rendering the clear and unambiguous language of the proviso meaningless.

It is clear from an examination of the proviso in question that the lead contained in copper matte was intended to be excepted from the tariff treatment prescribed for other lead-bearing ores and mattes enumerated in the enacting clause. Adherence to the natural meaning of the language employed leads to nothing impossible or plainly unreasonable, and we are, therefore, bound by the words employed and are not at liberty to raise doubts in order that resort may be had to construction. Therefore, giving the language employed its natural meaning it is clear that only the lead contained in copper matte, which is in fact reduced to a

state of possession as lead by the usual smelting or refining process, is dutiable.

Your former construction being plainly erroneous, and the language of the proviso not susceptible to construction, it follows that the reenactment of the language of the proviso in question in par. 391 of the Tariff Act of 1930, *supra*, did not give such construction the stamp of Congressional approval. (*New York, New Haven & Hartford Railroad Co. v. Interstate Commerce Commission*, 200 U. S. 361, 401-402.)

It is my opinion, therefore, that the duty which you are authorized to impose upon the lead contained in copper, gold or silver ores, or copper mattes, as enumerated in the proviso of par. 391 of the Tariff Act of 1930, *supra*, must be based only upon the amount of lead actually recovered in smelting or refining; and I accordingly recommend that your former construction in this respect be modified.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE TREASURY.

PORTO RICO—VALIDITY OF BOND ISSUE

The proposed issue for the Government of Porto Rico of bonds of the face value of \$300,000, the proceeds from the sale of which are to be devoted to the continuance of the construction of works for development and use of the waters of the Toro Negro and Matrullas Rivers, being authorized by Congress and by Act No. 7 of the Legislature of Porto Rico of April 6, 1931, and all the statutory requirements regarding the issue and sale of these bonds having been complied with, said bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of the people of Porto Rico.

DEPARTMENT OF JUSTICE,

February 4, 1932.

SIR: I have the honor to refer to your letter of December 23, 1931, stating that your Department has been authorized to sell for the account of the Government of Porto Rico bonds of the face value of \$300,000, the proceeds from which are to be devoted to the continuance of the construction of works for development and use of the waters of the Toro

Negro and Matrullas Rivers under the so-called Toro Negro Project.

The proposed bonds are to be issued under authority contained in section 3 of the Act of Congress approved March 2, 1917, entitled "An Act to provide a civil government for Porto Rico and for other purposes," as amended by the Act of March 4, 1927 (c. 145, 39 Stat. 951, 953; c. 503, 44 Stat. 1418; U. S. C., Title 48, sec. 741, 745), and Act No. 7 of the Twelfth Legislative Assembly of Porto Rico, Third Session, approved April 6, 1931, a copy of which was enclosed with your letter. The validity of a prior installment of these bonds, authorized by the same Act, was sustained in an opinion dated August 19, 1931. (36 Op. 452).

You state that the bonds are to be issued and sold by you at the request of the Treasurer of Porto Rico (which request has been approved by the Governor), in coupon form, in the denomination of \$1,000 each to be dated January 1, 1932, and to bear interest at the rate of $4\frac{1}{2}$ per centum per annum, payable semi-annually on January 1 and July 1 of each year, the principal thereof to be payable at the Treasury of the United States on January 1, 1952, and the bonds to be redeemable at par, with accrued interest, on January 1, 1942, or on any interest payment date thereafter. A copy of the form of the proposed bond is submitted with your letter and you request my opinion upon the legality of the issue.

Section 3 of the Act of March 2, 1917, as amended provides:

"* * * and when necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Porto Rico or any municipal government therein as may be provided by law, and to protect the public credit: *Provided, however,* That no public indebtedness of Porto Rico and the municipalities of San Juan and Ponce shall be allowed in excess of 10 per centum of the aggregate tax valuation of its property * * *. In computing the indebtedness of the people of Porto Rico, municipal bonds for the payment of interest and principal of which the good faith of the people of Porto Rico has heretofore been pledged and bonds issued by the people of Porto Rico secured by bonds to an equivalent amount of bonds of municipal corporations or school

boards of Porto Rico shall not be counted, but all bonds hereafter issued by any municipality or subdivision * * * for which the good faith of the people of Porto Rico is pledged shall be counted."

The documents submitted with your letter show that the aggregate assessed valuation of real and personal property in Porto Rico on June 30, 1931, amounted to \$331,683,530; that on November 20, 1931, there were outstanding bonds of the Government of Porto Rico of the face value of \$29,178,000; that the total amount of temporary loans outstanding was \$442,494.54; and that since the amendatory Act of March 4, 1927, the good faith of the people of Porto Rico has been pledged to the payment of principal and interest on municipal bonds aggregating \$1,330,500, which must be added to the foregoing, thus making a total of \$30,950,994.54, to be considered when ascertaining the total bonded indebtedness which the Government of Porto Rico is authorized to incur. Therefore, it is apparent that the proposed issue will not increase the bonded indebtedness beyond 10 per centum of the aggregate of the assessed valuation, the maximum permitted by law.

Section 1 of the Act of April 6, 1931, reads in part as follows:

"That the Treasurer of Porto Rico is hereby authorized, empowered and directed to issue bonds of The People of Porto Rico up to the sum of one million dollars (\$1,000,000.00), pursuant to the terms hereinafter set forth. The proceeds from the said issue of bonds of one million dollars (\$1,000,000.00) shall be covered into the Treasury of Porto Rico in the fund created by the 'Act for the Development of the Water Resources,' approved April 29, 1927, and known as 'Special Fund for the Development and use of the Water Power,' and shall be applied by the Commissioner of the Interior to the construction of the works of the Toro Negro Hydro-electric Project, including the completion of the Guineo Dam and the diversion of the waters of the Matruillas River for the generation of electric power at the Toro Negro Hydro-electric Plant: *Provided*, That this bond issue shall be made and sold as the work progresses, in partial amounts of one hundred thousand dollars (\$100,000.00), or

such multiples thereof, as according to the estimate of the Commissioner of the Interior, shall be required to take care of the expenditures of construction, so that the progress of the work may continue without interruption * * *."

Section 2 of said Act provides that the bonds may be in coupon form of the denomination of \$1,000 or registered form of the denomination of \$5,000, or both, shall bear interest at a rate not exceeding $4\frac{1}{2}$ per centum per annum, payable semi-annually on the first day of January and July, and shall be redeemable within twenty years from the date of issue, but reserving to the Government of Porto Rico the option and the right to redeem all or any of the said bonds at par, with accrued interest, on any interest payment date after the first ten years from the date of issue upon giving notice as prescribed by the Act, both principal and interest to be payable in Porto Rico, at the office of the Treasurer of Porto Rico, or at the Treasury of the United States, in gold coin of the United States of the present standard of weight and fineness.

Section 3 of said Act provides that the bonds may be sold by the Secretary of War of the United States, or by the Treasurer of Porto Rico, or by any fiscal agent appointed for the purpose by the Treasurer of Porto Rico, with the approval of the Governor, on terms most advantageous to the people of Porto Rico and as near the date of issue as possible; and that the Treasurer with the approval of the Governor, under the limitations prescribed therein, shall have absolute intervention and authority in all matters connected with the said bonds, including the terms and denominations thereof, and the manner, time, and method of their issue and sale. The Treasurer is authorized and directed to pay the principal and interest when due and an amortization fund for the redemption of the bonds is provided. For the payment of both principal and interest the good faith of the people of Porto Rico is irrevocably pledged.

There was transmitted with your letter a statement signed by the Commissioner of the Interior of Porto Rico, setting forth his estimate that a total amount of \$300,000 will be required in order to continue until July, 1932, the projects for which the bond issue is provided, and also a statement

signed by the Treasurer, setting forth his determinations in those matters left to his discretion, and this has been approved by the Governor in accordance with the Act of the Legislature.

I find that all the statutory requirements regarding the issue and sale of the said bonds have been complied with and that the form of bond submitted is in conformity with the law and the determinations of the Treasurer, approved by the Governor. The form of bond properly recites that "under the provisions of section 3 of the Act of Congress, approved March 2, 1917, as amended by the Act of March 4, 1927, this bond is exempt from taxation by the Government of the United States, or by the Government of Porto Rico or of any political or municipal subdivision thereof, or by any State, Territory, or possession, or by any county, municipality, or other municipal subdivision of any State, Territory, or possession of the United States, or by the District of Columbia."

It is therefore my opinion that the bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of the People of Porto Rico.

Respectfully.

WILLIAM D. MITCHELL.

To the SECRETARY OF WAR.

OFFICIAL BONDS—ATTORNEY GENERAL'S OPINION

The Secretary of Agriculture in the exercise of his discretion having fixed the bond of the regional fiscal agent, United States Department of Agriculture, Juneau, Alaska, at \$25,000 and thereafter, pursuant to section 14 of the Act of February 14, 1931 (46 Stat. 1114), consolidating the duties of said regional fiscal agent and those of the disbursing officer for the Alaska Game Commission, having required as security for the faithful performance of such additional duties an increase of \$20,000 in the bond of said regional fiscal agent, the question whether the second bond discharged the sureties on the first bond for defaults occurring subsequent to the execution of the second bond depends upon whether the Secretary intended the latter to be a substitute for the first, such intention to be determined from the terms of the instrument, construed in the light of the applicable statutes and surrounding circumstances.

Minor administrative questions of this kind should be worked out in the respective departments without formal opinions from the Attorney General.

DEPARTMENT OF JUSTICE,
February 8, 1932.

SIR: Under date of December 1, 1931, the Acting Secretary of Agriculture wrote me, stating that Mr. Harry L. Redlingshafer had executed two official bonds, one dated December 13, 1930, in the sum of \$25,000, with the Maryland Casualty Company as surety, to insure the faithful performance of his duties as regional fiscal agent, United States Department of Agriculture, Juneau, Alaska, and the second dated March 31, 1931, in the sum of \$45,000, with the same surety, to insure the faithful performance of his duties in a dual capacity as regional fiscal agent, and as disbursing officer for the Alaska Game Commission. The second bond was furnished pursuant to section 14 of the Act of February 14, 1931, c. 185, 46 Stat. 1111, 1114-1115 (U. S. C., Title 48, sec. 202a), amending the Alaska Game Law, 43 Stat. 739. He called attention to a question which has arisen as to whether these bonds are cumulative or whether the second was a substitute for the first as to transactions subsequent to the execution of the second bond, and asked for my opinion, the request being as follows:

"The question herein involved is important and arises from time to time. I therefore have the honor to request your opinion on whether (a) fiduciary bonds are cumulative, and (b) if so, whether the employees required to give such bonds are obligated to pay successive premiums to the bonding company."

I could not undertake to give any opinion as to whether fiduciary bonds are generally to be considered cumulative. Each case must depend on its own facts. No opinion in this case would be a safe guide in other cases arising under a different set of facts and under different statutes.

My predecessors have always held that where a question is of such a nature as to be affected by the facts and circumstances of a particular case the opinion will be confined to the actual case submitted.

The amount of bond required of regional fiscal agents of your Department is not fixed by statute but is discretionary with the Secretary of Agriculture. When the first bond was given, he fixed the amount of such security at \$25,000.

When it became advisable to consolidate the functions of regional fiscal agent and disbursing officer of the Alaska Game Commission, the Act of February 14, 1931, which authorized it required that "the bond of the disbursing officer so assigned shall be increased by the amount of \$20,000," that being the amount previously required by law for the executive officer of the Game Commission. It was therefore within the power of the Secretary to make the bond or bonds covering Redlingshafer in his dual capacity in any sum he chose, so long as it exceeded \$20,000. Whether the second bond was intended as a substitute for the first one or to be cumulative is therefore a matter of intention to be arrived at from the terms of the instrument, construed in the light of the applicable statutes and surrounding circumstances.

Authorities dealing generally with the question whether successive fiduciary bonds are cumulative are not very helpful. The facts of this case point to the conclusion that the second bond was intended as a substitute for the first for the period after the second bond was approved. There is no suggestion that the Secretary intended to or had any reason to double the amount of security previously thought sufficient on account of the operations of Redlingshafer as regional fiscal agent. The facts tend to support an inference that he intended to continue the security as regional fiscal agent at \$25,000, the amount previously fixed, and add \$20,000 as required by the Act of February 14, 1931, and that the second bond was intended to be the only security covering Redlingshafer in his dual capacity after the date of its approval.

Furthermore, the Act of February 14, 1931, stated that "the bond of the disbursing officer so assigned shall be increased by the amount of \$20,000," thus suggesting a single bond. A single bond covering the official in both capacities was preferable from the Government's standpoint to two bonds, one covering only disbursements as a regional fiscal agent, as there might be a commingling of funds of the two activities and, in case of two bonds with different sureties, obvious complications would follow.

As to the intention of the surety company, it does not appear that it has taken any different position or has made any demand for premiums on the first bond for the period subsequent to the execution of the second. Indeed, I infer its position has been that the first bond ceased to be in force as to transactions after the date of the second. There is the fact that the second bond is exactly the amount of the first plus the additional \$20,000 required by law, and if there had been any intention to increase the security for operations as regional fiscal agent it would seem rather an extraordinary coincidence that the amount should have been exactly doubled.

There is reason to believe that these bonds were not intended to be cumulative and that the peculiar facts of this case take it out of any general rules laid down by the courts. However, a definite conclusion does not seem to be necessary. The question is hardly of such a character or importance as to justify a formal opinion of the Attorney General. There have been no known losses under these bonds to raise any important question as to whether they are cumulative, and there does not seem to have been any real dispute as to the liability of the Government for premiums on the first bond, and any uncertainty that exists can easily be adjusted by administrative action. If a single bond in the penal sum of \$45,000 is considered adequate, it is a very simple matter to reach an understanding to that effect with the surety company. On the other hand, if security in the amount of \$70,000 is deemed necessary an arrangement to that effect can be quickly arrived at between your Department and the surety, and any doubts respecting the amount of the present security promptly removed by express agreement. With respect to future operations you have power to reduce or increase the security in your discretion, provided it exceeds \$20,000.

Minor administrative questions of this kind should be worked out in the respective departments without formal opinions from the Attorney General.

Respectfully yours,

WILLIAM D. MITCHELL.

To the SECRETARY OF AGRICULTURE.

VALIDITY OF PROPOSED GOVERNMENT CONTRACT FOR THE
RENTAL OF TABULATING MACHINES

The proposed contract between the Department of Commerce and the Remington-Rand Company for the rental of 42 tabulating machines at \$1,850 per month, the contract stipulating that said rental is based upon the understanding that all cards used with the equipment shall be purchased from the lessor and that if such cards are not purchased from the lessor the machine rentals shall be \$2,170 per month, is illegal in respect of the restriction upon the purchase and use of cards, which is in violation of section 3 of the Clayton Act. The execution of the proposed contract will not impose upon the Department of Commerce any legal obligation to refrain from purchasing cards from other sources, or to pay the increased rental for doing so.

DEPARTMENT OF JUSTICE,
February 11, 1932.

SIR: The validity of a proposed contract between the Department of Commerce and the Remington-Rand Company for the rental of so-called tabulating machines from the latter, about which you have requested the opinion of the Attorney General, has been considered.

The machines to which the contract will apply are already in the possession of your Department, and have been for several years, the present proposed contract being merely a renewal and continuation of a contractual relationship which has heretofore obtained between the Department and the Rand Company in respect of the machines. The present contract applies to 42 machines and fixes a total price or rental of \$1,850 per month. This rental, the contract states, is "based upon the understanding that all cards used with the equipment shall be purchased from the lessor. If cards used with the equipment are not purchased from the lessor, the machine rentals shall be" \$2,170 per month; that is, an increased charge of \$320 per month for using cards not purchased from the Rand Company.

The cards referred to are small, oblong pieces of thin pasteboard on which statistical or numerical information may be indicated or recorded by small holes punched through the cards. The tabulating machines segregate, assort, and classify the cards and the information thereon as they are passed through the machines. The cards are not patented.

We understand that your Department purchases and uses a vast number of these cards.

Formal execution of the present proposed contract by the Department has been withheld, pending a decision as to its legality under section 3 of the Clayton Act. (38 Stat. 731). That provision of law, omitting all words having no application to the present problem, is as follows:

“It shall be unlawful for any person to lease machinery for use within the United States or fix a price charged therefor on the condition, agreement, or understanding that the lessee shall not use or deal in the supplies of a competitor of the lessor, where the effect of such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.”

Assuming that the effect of the condition to purchase exclusively from the Rand Company “may” be to substantially lessen competition or tend to create a monopoly in the manufacture and sale of cards, the condition is violative of the above provision of law and is unenforceable. In so far as the Department of Commerce is concerned the question of the legality of this contract would arise, in the concrete, in litigation to enforce the condition, as, for instance, to recover the surcharge rental for failure to observe the exclusive purchase condition.

In such case the courts would refuse a judgment requiring the payment of that part of the consideration assigned to and given for exclusive dealing. It is my view, however, that the contract in its other features is a valid one.

It is obvious that the condition in the contract comes within the terms of and is condemned by the statute. In *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, the court refused to enforce a contract between the Standard Company and the Magrane Company which required the latter not to sell patterns except those made by and purchased from Standard. In that case the defense of the Magrane Company that the restriction was violative of section 3 of the Clayton Act was well taken and an injunction against purchases elsewhere refused. In *United Shoe Machinery Corporation v. United States*, 258 U. S. 451, con-

tracts containing similar restrictive clauses were held violative of section 3 of the Clayton Act.

May the condition substantially lessen competition or tend to create a monopoly in cards, that is to say is there a probability that the condition will be effective in this regard? Information in the possession of this Department shows that the present proposed contract is but one of a great many others between the Rand Company and all users of its machines, including other branches and offices of the Federal Government. As a whole, these contracts constitute a general and widely ramified system by which Remington-Rand machine users have yielded their right to buy, and are prevented from buying cards from any and all persons. By means of these restrictions an exclusion of virtually all others from the trade in cards has been effected. This would seem to put beyond doubt that the contracts are capable of producing the evil effect. Similar exclusive dealing arrangements have been used as efficient means of monopolization. In *United States v. Corn Products Refining Company*, 234 Fed. 964, it was said that by such contracts the defendant "had built a Chinese wall against competitors."

But this is more than is necessary under the decided cases to render the contract illegal. All that is necessary is that these contracts will *probably* lessen competition, etc. Thus, it was said in the *Standard Fashion Company Case*, above cited, that the expression "may be to substantially lessen competition" was synonymous with "probably lessen competition." In the present instance, the facts surpass this requirement. Here, an actual substantial lessening of competition and actual tendency to create monopoly, and more, is present.

As above stated, the contract is not invalid in its entirety because the restrictive clause is violative of the Clayton Act. The presence of the restriction does not make the contract inherently illegal. *United States v. Corn Products Co.*, 234 Fed. 964, 980; *Wilder Manufacturing Co. v. Corn Products Refining Company*, 236 U. S. 165. In the decree in the *Shoe Machinery Case*, supra, the restrictive clause was treated as severable, and only the restrictions were enjoined. Further, it is evident that the Rand Company intended to make the

contract severable in that regard. A specific part of the consideration is expressly assigned by the terms of the contract to the restrictive feature. The statement of the restrictive condition is attached to the written contract by way of a rider, and, thus, so to speak, is physically severed from the remainder of the contract.

My conclusion is that the proposed contract is legal except in respect of the restriction upon the purchase and use of cards. The basic rental and the other features of the contract are not affected by that restriction. Hence, the obligation to pay the basic rental and observe the other requirements are valid and enforceable so far as section 3 of the Clayton Act is concerned. Otherwise, however, it is invalid and unenforceable; and the signing and execution thereof as it stands, that is to say, embodying this restriction, will not impose upon the Department of Commerce any legal obligation to refrain from purchasing cards from other sources, or to pay the increased rental for doing so. No relief for nonobservance of the restriction would be awarded by the courts.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF COMMERCE.

STATE LICENSES FOR MOTOR TRUCKS OPERATED IN GRAND
CANYON NATIONAL PARK, ARIZONA

As to the authority of the State of Arizona to require Government contractors engaged in road construction work in the Grand Canyon National Park, Arizona, to take out State licenses for their motor trucks operated within the park limits, the Attorney General is in doubt as to whether he should render an opinion thereon to the Secretary of the Interior, it not being clear that the question involved has arisen in the administration of the latter's Department.

The State of Arizona has the power to require privately owned motor vehicles operated anywhere in the State on highway generally devoted to public travel to comply with its motor-vehicle license law.

With respect to any traffic on roadways constructed and maintained by the National Park Service, the Secretary of the Interior has power to establish regulations reasonably necessary to carry out the purpose for which the park has been established and is being

operated, and with respect to such roadways any State regulations necessarily inconsistent with the regulations of the Secretary of the Interior would be invalid, but no such inconsistency has developed.

DEPARTMENT OF JUSTICE,
March 8, 1932.

SIR: Under date of October 6, 1931, you asked my opinion as to the authority of the State of Arizona to require Government contractors engaged in road construction work in the Grand Canyon National Park, Arizona, to take out State licenses for their motor trucks operated within the park limits.

Section 304, Title 5, U. S. C., describing the duties of the Attorney General, authorizes him to give opinions to the head of any executive department "on any questions of law arising in the administration of his department." It not being clear that any question had arisen in the administration of your Department calling for administrative decision or action on your part, I wrote you on November 11, 1931, asking what question did arise in connection with this subject in the administration of your Department.

My opinion, if adverse to the State, would not be binding on it, and if it confirmed the State power, would not be binding on the contractor, and it did not appear that an opinion either way would guide you in any executive action on any question pending before you, or that you could do more with it than transmit it to the contractor for his information. On November 24, 1931, you wrote me in response to my letter of the eleventh, conceding these things to be so, but referring to the fact that the National Park Service has undertaken to prescribe rules and regulations for the control of traffic on Government roads within the park under the authority conferred by several applicable Acts of Congress providing for the administration, protection, and promotion of the park for the benefit and enjoyment of the people, saying: "In making and enforcing these regulations it is necessary to determine the limits within which the administrative authority conferred may be exercised, and the question as to the extent of the State authority, if any, in the premises must be considered." I infer from this that there is some proposal to prescribe new

rules respecting motor traffic on the park roads, although no definite proposal of that kind is submitted for my consideration. As to the matter of enforcing existing park regulations respecting motor traffic, it does not appear that there is any regulation enforcement of which raises any issue as to the power of the State to require privately owned vehicles in the park to obtain motor licenses under State law.

My attention has been directed to Automobile and Motor-Cycle Regulations effective within the Grand Canyon National Park, established under your authority, and set forth on pages 48 to 50, inclusive, of the fourth circular of the volume entitled "Circulars of General Information, the National Parks, 1931." These regulations have to do with the type and size of motor vehicles permitted and the equipment and methods of operation of motor vehicles, and they include a requirement that persons operating motor vehicles over park roads, other than residents of Coconino County, must obtain a permit and pay therefor a fee of one dollar. There is nothing in any of these regulations forbidding privately owned motor vehicles within the park to obtain and carry State licenses, and there is nothing in them which is necessarily inconsistent with the idea that privately owned vehicles shall obtain State licenses. Just what regulation could be adopted that would raise a direct question as to the right of the State to require motor vehicles operated in the park to obtain State licenses does not appear. I am, therefore, still somewhat at a loss to know just how the question does arise for action or decision in the administration of your Department. Aside from the correspondence referred to, I have been endeavoring to ascertain the status of the highways within this park, and whether they have been constructed and maintained by the State or county authorities or wholly by the United States. The situation with respect to these roads seems somewhat confused, but I infer from the information submitted that some of the roads were public highways before the park was established, some having been constructed by private enterprise, and that others have been built under the direction of the National Park Service and that now and again county authorities have spent some money in maintaining some of these roads.

Just what is the status of the highways on which the contractors are operating does not appear.

Under all these conditions it seems very doubtful whether I should render any opinion on the subject, but it having received some consideration in the Department I am willing to make some observations for your information. In the first place, I can not see that the fact that privately owned cars are being operated by Government contractors engaged in road construction work in the park has any direct or controlling bearing on the problem. The United States does not have exclusive jurisdiction over the park area. The United States is a proprietor of that part of the park area forming part of the public domain and not privately owned by others, and it also has certain sovereign powers under the Constitution to take such action and establish such regulations as are reasonably necessary to protect the property and control and regulate its use for National park purposes. The State, however, exercises jurisdiction throughout the park area just as it does throughout the rest of the State, subject to the limitation that the State may not embarrass, impair, or defeat the effective use of the lands for the purposes for which they are held, or interfere with the power of the United States to control and protect or dispose of them. *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, 527; *Chicago and Pacific Railway Co. v. McGlinn*, 114 U. S. 542, 545; *Surplus Trading Co. v. Cook*, 281 U. S. 647, 650; *United States v. Unzeuta*, 281 U. S. 138, 142. See *Hunt v. United States*, 278 U. S. 96; *Utah Power and Light Co. v. United States*, 243 U. S. 389, 404, 405; *Ohio v. Thomas*, 173 U. S. 276, 283. The rule is stated as follows in the *Surplus Trading Company case*, *supra* (p. 650) :

“It is not unusual for the United States to own within a State lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the State. On the contrary, the lands remain part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its rights of disposal.”

This State jurisdiction over Federal public domain includes the exercise by a State of its police power (*McKelvey*

v. United States, 260 U. S. 353, 359; *Omaechevarria v. Idaho*, 246 U. S. 343, 346), and where, as here, the Congress has not legislated upon the subject a State may control and regulate the use of public highways within its borders though in territory owned by the United States (*New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 651; cf. *Colorado v. Toll*, 268 U. S. 228, 231).

The question as to the power of the State to require licensing of privately owned motor vehicles operated within the park limits depends on the principles above outlined and not on the question whether the operator of the vehicle is engaged in the performance of a Government contract. The contractors are not Government employees, and it is clear that if these contractors were performing a Government contract in that part of Arizona outside of the Grand Canyon National Park they would not be immune from the requirement of the State law that their motor vehicles be licensed.

The real question is whether the State has power to require any privately owned motor vehicles operated within the park to be licensed. Section 1686 of the Revised Code of Arizona for 1928, relating to the licenses of motor vehicles, as amended by c. 100 of the Session Laws of 1931, defines State highways and county highways, and then proceeds to define the word "highway" to mean "any way, road, or place of whatever nature, open to the use of the public as a matter of right for the purpose of vehicular travel." Other provisions of the law require any motor vehicles operated upon any highway to obtain licenses. The operation and effect of the State law being a State question, we must accept the conclusion of the chief law officer of the State that roads throughout the park which are open to the use of the general travelling public are highways within the meaning of this statute.

I have yet to find any persuasive ground for the conclusion that the State of Arizona has not the power to require privately owned motor vehicles operated anywhere in the State on highways generally devoted to public travel to comply with the motor-vehicle license law. It is true that under Acts of Congress you have authority to establish reasonable regulations respecting motor traffic within the

park area and which are required for the protection of the area for park purposes, although there are limits beyond which you can not go on roads constructed by the State before the park was established. See *Colorado v. Toll*, 268 U. S. 228. As long as the regulations established by the State and those prescribed by you are not necessarily inconsistent and they may be concurrently enforced, I see no reason why the State regulations enacted in the exercise of its jurisdiction should be held invalid. The fact that the State law requires a motor license for privately owned vehicles operated within the park and your regulations require an additional park permit does not make them necessarily inconsistent, as both permits are obtainable. As the fact that the operator of a motor vehicle is engaged in the performance of a Government contract does not exempt him from the requirement of the State law that a license be obtained, to hold that the State license law is inapplicable to a Government contractor operating his trucks within the park would mean that no privately owned and operated motor vehicle within the park would have to obtain a State license. That conclusion does not seem to be justified by any principle yet announced by the courts. With respect to any traffic on roadways constructed and maintained by the National Park Service, you have power to establish regulations reasonably necessary to carry out the purpose for which the park has been established and is being operated, and with respect to such roadways any State regulations necessarily inconsistent with yours would be invalid, but no such inconsistency has developed.

Respectfully yours,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE INTERIOR.

REQUEST OF SENATE FOR ATTORNEY GENERAL'S OPINION
ON RAILROAD MERGERS

The Attorney General feels obliged to refrain from responding to a request from the Senate for his opinion respecting the legality of recent railroad mergers, since the Federal statutes do not authorize, empower, or require him to give opinions to either House of Congress or to the committees thereof.

DEPARTMENT OF JUSTICE,
April 25, 1932.

SIR: Senate Resolution 173, after reciting that it has been asserted that through the formation of holding companies, combinations of parallel and competing railroads engaged in interstate commerce have recently been made without authority of law, proceeds as follows:

"Resolved, That the Attorney General of the United States be requested to inform the Senate as soon as practicable (1) whether such transactions constitute contracts, combinations, or conspiracies in restraint of trade or commerce among the several States or attempts to monopolize or restrain such commerce, in violation of the Act of Congress of July 2, 1890, as amended, commonly called the Antitrust Act; (2) in what respect, if any, such transactions differ from the operation condemned by the Supreme Court of the United States in the so-called Northern Securities case (193 U. S. 197); and (3) what steps, if any, have been taken, or are contemplated by the Department of Justice for the enforcement in these instances of the antitrust laws."

The first two subdivisions of this resolution request me to give an opinion to the Senate on legal phases of the subject matter of the resolution. I feel obliged to refrain from responding to this request.

The powers of the Attorney General in the matter of giving opinions on questions of law are defined in sections 354 and 356 of the Revised Statutes (Title 5, Sections 303 and 304, U. S. C.). These statutes are:

"The Attorney General shall give his advice and opinion upon questions of law, whenever required by the President," and

"The head of any Executive Department may require the opinion of the Attorney General on any questions of law arising in the administration of his Department."

These statutes, in substantially this form, have been in effect since 1789. They do not authorize, empower, or require the Attorney General to give opinions to committees of Congress or to either House. For more than one hundred years there has been an unbroken line of authority to that

effect. As early as 1818 Attorney General Wirt held that under these statutes Attorneys General are not authorized to give officials opinions on questions of law except upon call of the President or at the request of one of the heads of the executive departments to enable him to decide a question pending in his own department for action.

In the following instances the Attorneys General have, for the reasons stated, declined to give official opinions on questions of law or on the constitutionality or construction of legislation either pending or enacted, to committees of the House or to committees of the Senate or in response to resolutions or requests from the Senate itself or from the House of Representatives: 1 Op. 335; 5 Op. 561; 10 Op. 164; 12 Op. 544; 14 Op. 17; 14 Op. 177; 17 Op. 357; 18 Op. 87; 18 Op. 107.

Under date of January 28, 1820, the House of Representatives entered an order requesting the opinion of Attorney General Wirt respecting a matter in which the House was interested. In declining to give the opinion the Attorney General, among other things, said:

“The Attorney General is sworn to discharge the duties of his office according to law. To be instrumental in enlarging the sphere of his official duties beyond that which is prescribed by law would, in my opinion, be a violation of this oath.” (1 Op. 336.)

That opinion has stood unquestioned for one hundred and twelve years and has been repeatedly followed in later rulings. Under date of December 17, 1884, Attorney General Brewster felt obliged to decline compliance with a resolution passed by the House of Representatives requesting his opinion on the application of a section of the Revised Statutes (18 Op. 87). Having failed to obtain the opinion by direct request, the House of Representatives passed another resolution requesting the Postmaster General to ask for the Attorney General's opinion, and the Postmaster General transmitted the request to the Attorney General who again refused to give the opinion on the ground that he had no authority to give it to the House of Representatives and the Postmaster General did not need it on any question pending in his Department.

Under date of February 14, 1929, my immediate predecessor declined the request of the House Committee on Expenditures in the executive departments for an opinion, and on June 3, 1930, I felt obliged to decline an opinion requested by the Judiciary Committee of the Senate.

Congress has accepted this long standing interpretation of the law and has never attempted by law to enlarge the powers or duties of the Attorney General so as to require him to give opinions to either House of Congress or to committees thereof. Having in mind the constitutional separation of the functions of the legislative, executive, and judicial branches of the Government, there has always been a serious question whether the principle of that separation would be violated by a statute attempting to make the Attorney General a legal adviser of the legislative branch, and as a matter of governmental policy the wisdom of constituting as legal adviser of either House of Congress an official of the executive department, who sits in the President's Cabinet and acts as his legal adviser, has always been open to doubt.

When pending legislation affecting the Department of Justice has been referred to Attorneys General for comment or suggestion, it has been their practice to suggest such legal points as are pertinent and which ought to receive consideration by committees, but that practice has never properly involved any formal legal opinions from Attorneys General and has no resemblance to a request for an opinion as to the effect of an existing statute.

With the utmost deference for the request of the Senate, I am obliged to decline to give an opinion in this case.

* * * * *

Respectfully yours,

WILLIAM D. MITCHELL

To the PRESIDENT OF THE SENATE

CITIZENSHIP OF INGRID THERESE TOBIASSEN

Ingrid Therese TobiasSEN, a minor, who was born in the United States and whose father, after becoming a citizen of the United States by naturalization, took her to Norway, his native country, where he established and has ever since maintained a permanent residence, has acquired Norwegian nationality through the nat-

uralization of her father as a Norwegian subject, and consequently she has ceased to be an American citizen.

DEPARTMENT OF JUSTICE,
June 16, 1932.

SIR: I have the honor to acknowledge your request of August 11, 1931, for my opinion with respect to the citizenship of Ingrid Therese Tobiassen, who has applied to your Department for a return permit under section 10 of the Immigration Act of May 26, 1924 (43 Stat. 158; U. S. C. A. Title 8, sec. 210).

From your statement of the facts it appears that Miss Tobiassen, aged twenty, was born in New York City on February 15, 1911; that her father, a native of Norway, became a citizen of the United States by naturalization on February 20, 1912; that in 1919 Miss Tobiassen, when eight years old, was taken by her parents to Norway, where the parents have since resided; that at the age of eighteen Miss Tobiassen returned to the United States, and, so far as the record indicates, has taken up her permanent residence in the city of Princeton, New Jersey; and that her purpose in asking for a return permit is to visit her parents in Norway.

According to your letter the State Department declined to issue a passport to Miss Tobiassen on the ground that she had acquired Norwegian nationality and had ceased to be an American citizen, while in a memorandum opinion, a copy of which accompanied your letter, the Solicitor of your Department expressed the opposite conclusion. It is because of this conflict of views that you desire my opinion.

In answer to an inquiry the Secretary of State confirmed your statement regarding the position of his Department and added that its ruling with respect to Miss Tobiassen was in accordance with the practice of his Department in similar circumstances. He explained that, on account of the importance of the question, the Legation at Oslo, Norway, had been requested to ascertain from the Norwegian authorities whether Miss Tobiassen was regarded as having been naturalized as a Norwegian subject. The despatch from the Legation, in response to this instruction, follows:

"The Norwegian Foreign Office has informed this Legation in a letter dated November 9, 1931, that with reference to Miss Tobiassen's status the Department of Justice and

Police stated that 'Miss Tobiassen's father is presumed to have regained his citizenship in 1919 when he took up his residence in Norway, and that his daughter, Ingrid Therese, in accordance with the law then in force relative to Norwegian citizenship, dated April 21, 1888, paragraph 4, acquired Norwegian citizenship together with her father, provided she lived with her parents or was supported by them.' "

The position of the State Department is predicated upon the provisions of Articles I and III of the Naturalization Treaty between the United States and Sweden and Norway of June 14, 1871, and III of the Protocol thereto, which are as follows:

"ARTICLE I. Citizens of the United States of America who have resided in Sweden or Norway for a continuous period of at least five years, and during such residence have become and are lawfully recognized as citizens of Sweden or Norway, shall be held by the Government of the United States to be Swedish or Norwegian citizens, and shall be treated as such.

* * * * *

"ARTICLE III. If a citizen of the one party, who has become a recognized citizen of the other party, takes up his abode once more in his original country, and applies to be restored to his former citizenship, the Government of the last-named country is authorized to receive him again as a citizen, on such conditions as the said Government may think proper.

III. *Relating to the third article of the convention.*

"It is further agreed that if a Swede or Norwegian, who has become a naturalized citizen of the United States, renews his residence in Sweden or Norway without the intent to return to America, he shall be held by the Government of the United States to have renounced his American citizenship.

"The intent not to return to America may be held to exist when a person so naturalized resides more than two years in Sweden or Norway."

The State Department also invites attention to sections 4 and 6 of the Norwegian Nationality Law of August 8, 1924 (*Nationality Laws*, Flournoy and Hudson, p. 453):

"SECTION 4. Any person who is a natural-born Norwegian subject, and who has ceased to be a Norwegian subject, will again become a Norwegian subject by taking up his regular domicile in Norway. If, however, he ceased to be a Norwegian subject through acquiring a foreign nationality, or if he later acquired foreign nationality, he will not again be deemed to be a Norwegian subject until he has ceased to be of foreign nationality."

* * * * *

"SECTION 6. When a person becomes a Norwegian subject in pursuance of section 2 or section 4, his wife, and unmarried children under eighteen years of age, born in wedlock, shall also be deemed to be Norwegian subjects, provided they reside in Norway. If they do not reside there, and the wife subsequently, the marriage being in force, or the children, being unmarried and under eighteen years of age, take up her (their) residence in Norway, she (they) shall then be deemed to be Norwegian subjects provided the husband still is a Norwegian subject."

The power to make treaties is given by the Constitution in general terms, and it has been authoritatively settled that such power was designed to include all those subjects which, in the ordinary intercourse of nations, had usually been made subjects of negotiation and treaty, and which are consistent with the nature of our institutions. That the power includes the right to deal with naturalization can hardly be regarded as debatable. "A treaty is just as much a law of the United States as an Act of Congress. Hence, it was decided, in the case of *Crane v. Reeder*, 25 Mich. 303, that the minor child of one who became a citizen under Article 2 of Jay's Treaty, if residing in the United States at the time, thereby became a citizen of the United States." Van Dyne, *Naturalization*, 220. And Attorney General Griggs, in 23 Op. 348, used the following pertinent language:

"It never seems to have been supposed that the power to established a *uniform* rule of naturalization meant anything more than that individual applications to become citizens by proceedings in judicial tribunals should rest upon uniform authority and should follow the same forms everywhere in the United States, and in the territories when the rules

should be extended and applied to them by Congress. It has never been asserted that the language of this grant of power affected the right of Congress to exclude or to admit certain classes of aliens by special or collective provisions; or the right of the treaty-making power to stipulate for the same results."

The Solicitor of your Department refers to the provision in section 2 of the Act of 1907 that no American citizen shall be allowed to expatriate himself while this country is at war, in connection with which he invites attention to the fact that the World War had not ended in 1919 when Miss Tobiassen's father went to Norway. Inasmuch, however, as her father was still residing in that country in 1921, when the war was formally terminated, and has continued to reside there ever since, the point appears to be of no importance. That he established a permanent residence in Norway is not disputed, and there is, I think, no doubt that this action on his part effected a like change in the residence of Miss Tobiassen. To constitute a change of domicile, there must be residence with the intention that it is to be permanent. In *Lamar v. Micou*, 112 U. S. 452, 470, the court said:

"An infant cannot change his own domicil. As infants have the domicil of their father, he may change their domicil by changing his own; and after his death the mother, while she remains a widow, may likewise, by changing her domicil, change the domicil of the infants; the domicil of the children, in either case, following the independent domicil of their parent."

The right of expatriation, of which there has been statutory recognition by this country from an early period, was carried into section 1999 of the Revised Statutes. The last legislative expression upon the subject is the provision in section 2 of the Act of March 2, 1907 (34 Stat. 1228; U. S. C. A. Title 8, Sec. 17), which provides as follows:

"Any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state. * * *"

There has also been for many years statutory provision whereby foreign-born minor children become citizens of the

United States through the naturalization of their parents. The last enactment upon this subject is section 5 of the above mentioned Act of 1907 (U. S. C. A. Title 8, sec. 8), by the terms of which minor children do not acquire citizenship until they have taken up a permanent residence in the United States. Citizenship acquired by minor children in this manner is deemed equivalent to formal naturalization under Acts of Congress. *United States v. Kellar*, 13 Fed. (C. C.) 82, 85; *United States v. Tod*, 297 Fed. (C. C. A.) 385, 392.

It is to be noted that the claim that Miss Tobiassen has ceased to be an American citizen does not rest upon the terms of the Naturalization Treaty with Norway, but upon a law of that country, as the result of the renunciation by her father, a native of Norway, of his American citizenship, and the resumption of his Norwegian nationality in pursuance of the terms of that treaty. The law of Norway, under which Miss Tobiassen is said to have forfeited her American citizenship and to have acquired that of her father, is analogous to our statutes, to which attention has just been directed, by virtue of which foreign-born minor children of persons naturalized in the United States are declared to be citizens of this country.

In view of the foregoing it is deemed unnecessary to discuss the doubt suggested by the Solicitor of your Department as to whether it is within the province of the treaty-making power to stipulate the conditions which shall constitute expatriation in respect of a native-born citizen.

Inasmuch as under our laws a foreign-born minor child obtains a citizenship status through the naturalization of the father, it seems to me inconsistent, to say the least, to deny a like effect to similar laws of Norway. For this reason and the other considerations herein mentioned, the conclusion of the State Department that Miss Tobiassen acquired Norwegian nationality, and consequently has ceased to be an American citizen, is, in my opinion, correct.

The file which accompanied your letter is returned herewith, as requested.

Respectfully,

WILLIAM D. MITCHELL.

To the Secretary of Labor.

**CLAIM FOR INTEREST PAID ON BORROWED MONEY UNDER
THE WAR MINERALS RELIEF ACTS**

The claim of Logan Rives under the War Minerals Relief Acts for interest paid on borrowed money for use in operation, which claim was not included in Rives's original application and which was not presented to or considered by the then Secretary of the Interior, should not, under the circumstances herein stated, be allowed.

The Secretary of the Interior should not reopen final decisions of his predecessors under the War Minerals Relief Acts except in those cases in which resort was had to the courts under the amendment of February 13, 1929 (45 Stat. 1166), and then only to the extent directed by the courts.

DEPARTMENT OF JUSTICE,
June 18, 1932.

SIR: On March 11, 1932, you asked for my advice respecting the claim of Logan Rives under the War Minerals Relief Acts of March 2, 1919 (40 Stat. 1272), November 23, 1921 (42 Stat. 322), and February 13, 1929 (45 Stat. 1166), for interest paid on borrowed money. The amount of this claim is only \$178.15, but since the disposition of it raises a number of questions which may be important in respect of other claims, we have given it very careful consideration.

It appears that Rives's claim for losses incurred was filed in your Department on May 8, 1919. Your regulations provided that claims of this nature should be presented in detail on a questionnaire, the form of which was prescribed in your Department, and Rives's claim thus filed was in the form of such a questionnaire with answers inserted by him. He included in his claim demands for reimbursement for losses sustained as the result of purchase of lands and also for losses alleged to have been sustained in operation. Neither the claim for loss resulting from the land purchase nor the claim for loss in operation included any item for interest on borrowed money. Question 27 in the questionnaire form, and the answers thereto made by Rives, are as follows:

"27. (a) What amount and rate of interest did claimant pay on loans used in the production, and preparation for production of any of the above enumerated minerals?

"(Ans.) 8% on \$20,000.00.

"(b) Are such amounts of interest included in your estimate of losses?

"(Ans.) No."

It thus appears that he did state in his claim that he had paid interest on a loan used in the production and preparation for production, although he did not state the exact amount, and did state that the interest was not included in his estimate of losses. His claim was considered in the Department of the Interior and a final decision made thereon by the First Assistant Secretary in November, 1922. His claim for losses on account of the purchase of land was disallowed. No claim for interest paid on borrowed money was made or urged or considered, and for that reason no decision was made by your predecessor on any claim for interest on borrowed money.

Being dissatisfied with the decision of your predecessor with respect to the disallowance of the claim for net losses on account of land purchased, Rives instituted proceedings in the Supreme Court of the District of Columbia to obtain a writ of mandamus to compel the Secretary of the Interior to consider and allow his claim for losses in obtaining release from a contract he had made to buy land containing manganese. He made no effort in that proceeding to compel the Secretary to consider a claim for interest because no such claim had been urged upon or considered, or decided by the Secretary of the Interior. That case went to the Supreme Court (*Work v. Rives*, 267 U. S. 175) and was decided against Rives on the ground that the courts had no jurisdiction to review the action of the Secretary.

Thereafter the Act of February 13, 1929, was passed. It provided:

"That any claimant who has heretofore filed with the Secretary of the Interior within the time and manner provided by existing law a claim under said Acts generally known as the War Minerals Acts (Fortieth Statutes, page 1272, and its amendments) may within one year from the date of the passage and approval hereof petition the Supreme Court of the District of Columbia to review the final decision of the Secretary of the Interior upon any question

of law which has arisen or which may hereafter arise in the adjustment, liquidation, and payment of his claim under said Acts, but the decision of the Secretary of the Interior on all questions of fact shall be conclusive and not subject to review by any court."

On February 10, 1930, Rives availed himself of the permission to bring suit and filed his petition in the Supreme Court of the District of Columbia to review errors of law alleged to have been committed by the Secretary of the Interior in passing on his claim. He specified in his petition two items of loss which he contended had been wrongfully disallowed by your predecessor in his final decision. The first item was on account of forfeited payments and other losses in connection with the contract to purchase land. The second item set up in his petition was as follows: "Interest paid on borrowed money (a loan of \$20,000 used in said operation) to November 11, 1918. This item disallowed under general rule, \$178.13." So far as the record shows, that was the first time that he asserted any right to reimbursement for interest.

On March 29, 1930, you interposed an answer to this petition, admitting that Rives's original claim included an item for purchase price of property and that the Secretary of the Interior had disallowed that item, but denied that any claim had been filed with the Secretary of the Interior on account of any interest paid on borrowed money, and denied that Rives had included any such item of interest in his estimate of losses filed with the Secretary of the Interior, and denied that the final decision of your predecessor adjusting and liquidating Rives's claim had disallowed any item of interest.

The case stood in that form in the Supreme Court of the District of Columbia without trial until the Supreme Court of the United States, in decisions rendered December 7, 1931, in cases in which the Vindicator Consolidated Gold Mining Company and the Chestatee Pyrites and Chemical Corporation were parties, held that losses on account of expenditures for purchase of land and losses on account of expenditures by way of interest on borrowed money were allowable items. Thereafter, on February 3, 1932, the Supreme Court

of the District of Columbia in the pending suit by Rives against you entered a decree upon petition and answer and by consent of the parties in the following form:

"On consideration thereof and by consent of the parties, it is *adjudged, ordered, and decreed*:

"That the respondent, Ray Lyman Wilbur, Secretary of the Interior, be and he is hereby, authorized and directed to forthwith proceed to ascertain whether the petitioner on March 2, 1919, had incurred net losses by reason of expenditures made in the purchase of mining lands theretofore employed by him in preparing to produce and producing manganese ore in compliance with the request or demand of the Department of the Interior or other authorized agency to supply the urgent needs of the nation in the prosecution of the World War, and for which in justice and equity the petitioner is entitled to receive reimbursement from the appropriations made by Congress for the payment of such losses; and to thereupon proceed to the final adjustment of the petitioner's claim filed pursuant to the Act of Congress of March 2, 1919, Chapter 94, in accordance with the facts as determined by him."

The question now presented is whether, by virtue of this decree or otherwise, Rives's claim for interest should be allowed and paid. It will be noted that the claim does not involve any interest accrued after March 2, 1919, the date of the passage of the Relief Act.

It is obvious that the decree should not be construed to direct you to consider or allow the interest claim. An issue was raised in the pleadings in this case as to whether the Court should consider or direct you to consider and allow any claim for interest which had not been urged before your predecessor and which had never been disallowed by him, but that issue seems to have been ignored, and the decree entered by stipulation makes no mention of the subject. The decree makes specific reference to the claim for net losses by reason of expenditures made in the purchase of lands and directs you thereupon to proceed to the final adjustment of the petitioner's claim. There is nothing on the face of the decree which justifies the conclusion that the Court intended to direct you to consider the interest claim.

The general provision in the decree that you shall proceed to consider Rives's claim "pursuant to the Act of Congress of March 2, 1919," must be construed to relate to the previous provisions of the decree respecting expenditures for the purchase of land. If the interest claim had arisen because of money borrowed for use in the purchase of land it might have been plausibly contended that as the decree ordered a consideration of the loss resulting from the purchase of land such an interest claim constituted a part of it, but that argument is definitely removed from the case by the disclosure in Rives's petition filed in the Supreme Court of the District that the interest item had no relation whatever to land purchase, but arose in connection with money borrowed for use in operation.

There are other reasons, some fundamental in their nature, why the decree should not be construed to direct consideration of the interest claim. It would be an extraordinary thing if a court should entertain a petition for a writ of mandamus to compel a public official to consider a claim which had never been presented to him and which he had never disallowed. Furthermore, the Act of February 13, 1929, giving jurisdiction to the Supreme Court of the District of Columbia, only authorizes that court to "review the final decision of the Secretary of the Interior upon any question of law which has arisen or which may hereafter arise in the adjustment, liquidation, and payment of his claim under said Acts." Clearly this does not authorize the Court to consider any question of law not arising under the final decision of the Secretary. As the Secretary had never made any decision prior to the passage of the Act of February 13, 1929, or within one year thereafter respecting the interest claim, there was no question of law relating to interest on which the Court had any jurisdiction to pass. Besides these considerations, there is the fact that the Act of February 13, 1929, conferring jurisdiction on the Court, provides that the decision of the Secretary of the Interior, on all questions of fact shall be conclusive and leaves to the Court only questions of law, and as there are no findings in this case by the Secretary with respect to the interest item because the claim was never presented to or considered by

him, there was no basis for any consideration by the Court of the interest item.

Under all these conditions, the contention that the Supreme Court had power or intended to pass on the interest claim never considered by the Secretary, and asserted for the first time in the judicial proceeding, must be rejected. In the judicial proceeding, the case was not to be tried *de novo*. The resort to the courts allowed by law was in its nature an appellate proceeding to review decisions by the Secretary. The contention that the decree requires consideration of the interest claim is not plausible.

The question remains whether, although the decree itself does not touch the point, it is still your duty or within your power to consider and allow this interest claim. The original Relief Act provided that the Secretary "shall consider, approve and dispose of only such claims as shall be made hereunder and filed with the Department of the Interior within three months from and after the approval of this Act." That limitation has never been removed. Rives did file claim for losses within the three months period, and the question arises whether his original claim was broad enough to cover the claim for interest on money borrowed for use in operations, and, if not, whether it was permissible for him to amend his claim to include the demand for the interest after the time limited by law to file claims, but it does not seem necessary to decide that question. The final decision on Rives's claim was made by one of your predecessors in November, 1922. In an informal opinion dated March 20, 1929, I advised you that there was grave doubt whether you should or could reopen final decisions of your predecessors under the War Minerals Relief Act, and that all claimants under that Act could only proceed with safety on the theory that unless they appealed to the courts under the Act of February 13, 1929, and within the time therein specified, they would lose any right for review of the decisions of your predecessors on their claims, and it was suggested that you should not encourage claimants to believe that you could or would reopen decisions of your predecessors where review was not sought in court under the Act of February 13, 1929. In that connection see: *2 Op. 8; 13 Op.*

33, 387; 15 Op. 208; 28 Op. 180; 34 Op. 250, 255. Furthermore, the Act of February 13, 1929, conferring jurisdiction on the courts to review the decisions of the Secretary of the Interior by its limitation of time for resort to the courts, carries the necessary inference that decisions of the Secretary, review of which was not sought in the courts, within the time specified, should stand. It appears to me you should proceed on the principle that the decisions of your predecessors are not to be reopened except in those cases in which resort was had to the courts under the Act of February 13, 1929, and then only the extent directed by the courts. There is nothing in the Act of February 13, 1929, or in any of the other legislation on this subject, which justifies the conclusion that the Congress intended that final decisions of your predecessors on which settlements had been closed and in respect to which no review was sought by the claimants in court, could be reopened in the future without limit as to time to make the old award conform to conclusions which the courts might reach in those cases which were appealed to them.

My conclusion is that the interest item in the Rives claim should not be allowed.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE INTERIOR.

CLAIM OF THE NETHERLANDS GOVERNMENT UNDER
SECTION 3 OF THE DENT ACT

The agreement made between the representatives of the United States and the Netherlands Government concerning the price to be paid to the Netherlands Government for war materials taken over by the United States in 1917, which were to be furnished to a foreign government, is within the purview of section 3 of the Dent Act (40 Stat. 1273).

The claim, arising out of the agreement to adopt as a basis for ascertaining just compensation the costs of the supplies in lieu of the market value, is within the scope of section 3 of the Dent Act, *supra*.

The action taken by Assistant Secretary Wainwright, as indicated in his letter and memorandum of April 12, 1922, was not an adjustment or an adjudication of this claim under section 3 of the Dent Act, *supra*.

DEPARTMENT OF JUSTICE,
June 24, 1932.

SIR: I have the honor to comply with your request of April 13, 1932, requesting my opinion under the arrangements by which certain war supplies belonging to the Netherlands Government were taken over by the United States in 1917, whether (1) the taking of the supplies by the United States Government was a taking under agreement or arrangement within the purview of section 3 of the Act of March 2, 1919; (2) whether the claim, arising out of the agreement to adopt as a basis for ascertaining just compensation the costs of the supplies in lieu of the market value, is covered by section 3 of the Act of March 2, 1919; and (3) whether the action taken by Assistant Secretary Wainwright, as indicated in his letter and memorandum of April 12, 1922, was an adjustment or an adjudication of this claim under section 3 of the Act of March 2, 1919.

Section 3 of the Dent Act of March 2, 1919, c. 94, 40 Stat. 1273, reads as follows:

"SEC. 3. That the Secretary of War, through such agency as he may designate or establish is empowered, upon such terms as he or it may determine to be in the interest of the United States, to make equitable and fair adjustments and agreements, upon the termination or in settlement or readjustment of agreements or arrangements entered into with any foreign government or governments or nationals thereof, prior to November twelfth, nineteen hundred and eighteen, for the furnishing to the American Expeditionary Forces or otherwise for War purposes of supplies, materials, facilities, services or the use of property, or for the furnishing of any thereof by the United States to any foreign government or governments, whether or not such agreements or arrangements have been entered into in accordance with applicable statutory provisions; and the other provisions of this Act shall not be applicable to such adjustments."

You state that in 1915 the Netherlands Government sent to the United States a delegation headed by Colonel G. W.

H. J. Boom to purchase machine guns and ammunition. This delegation purchased 1,600 Colt machine guns, 83 special pedestals and 99,985,000 rounds of ammunition for the guns, under contracts with certain manufacturers in the United States at prices of \$650.00 each for machine guns, \$150.00 each for the pedestals and \$40.00 per thousand for the cartridges. These war materials were delivered to the representatives of the Netherlands Government and were stored in the United States some time before December, 1917. Permission to ship these materials to Holland was not granted by the United States.

In the fall of 1917 the Italian Government requested the United States to procure for it a supply of machine guns and ammunition. A test of the material belonging to the Netherlands Government was suggested to ascertain whether it would serve the need of the Italian Government. A representative of the Italian Government agreed that if such a test were successful his Government would accept the material and pay the United States whatever the material had cost the Netherlands Government.

On November 7, 1917, three of the stored machine guns and 10,000 rounds of ammunition were requisitioned by the United States. A test was made and proved successful. On November 15, 1917, Colonel Boom conferred personally with General Babbitt, Assistant Chief of Ordnance, who informed the Netherlands representative that the remaining guns and ammunition in storage would be seized. At Colonel Boom's suggestion General Babbitt agreed to take the pedestals also. Soon afterwards the remaining guns and ammunition were requisitioned and shipped to Italy. No formal requisition was ever made of the pedestals but they were also delivered to the Italian authorities. On November 19, 1917, the State Department formally notified the Minister of the Netherlands of the requisition stating "that appropriate steps will be taken to reimburse the owner or owners of the property." It appears that there was an understanding that the Netherlands Government would not insist upon the value of the property when seized as the measure of just compensation but would accept a

reimbursement of the amount expended by it for the war materials. General Babbitt testified in his affidavit of May 14, 1918, on this point as follows:

"In reply to your telegraphic inquiry of even date herewith, with regard to the basis of the agreement between the Ordnance office and the purchasing delegation of the Government of the Netherlands War Mission concerning the payment for the ordnance material consisting of machine guns and ammunition requisitioned from said government in the month of November, 1917, the agreement as made between the writer representing the Chief of Ordnance and Colonel Boom, head of said purchasing delegation, was that the Dutch Government would be reimbursed to the extent of the sums actually expended for the material seized, and that the incidental expenses of the mission so far as the procurement of the material was concerned would be the subject of later conference and adjustment."

Colonel Boom in his affidavit of September 30, 1931, stated that—

"from his conferences with the officials of the United States Government and this letter from its State Department 19 November, 1917, it was his understanding that reimbursement meant payment to Holland of the full cost to her of these materials. It is natural that he thought that such payment would be made in florins or their equivalent."

The claim of the Netherlands Government was referred to the War Department Board of Appraisers which on June 18, 1918, made award No. 33 of \$5,704,646.29 with 5 per cent interest from May 31, 1918, as just compensation, "excepting the separate claim for payment in florins."

On June 21, 1918, \$5,720,492.53 was paid to the Netherlands Government pursuant to this award. There was an error in the computation of this figure amounting to \$29,619.48. Later, another award No. 513 (as revised) was made to the Netherlands Government for the requisition of certain barbed wire amounting to \$170,656.94 less the above erroneous overpayment. As payment of this latter award was tendered in dollars the Netherlands Government refused to accept it and it remains unpaid.

The commercial attaché of the Royal Netherlands Legation presented the claim to the War Department, seeking reimbursement of the cost in florins to the Netherlands Government of its purchase of these war materials. On April 12, 1922, the Assistant Secretary of War wrote the commercial attaché his determination that the claim was allowable only to the extent of the dollars actually paid by the Netherlands Government for the war materials, that certain other adjustments as to interest should be made and that a formal tender of the resulting amount would be made. In a memorandum of the same date the Assistant Secretary of War thoroughly outlined his determination and his reasons for reaching it. Nothing in this memorandum indicates that it purported to be an adjustment of this claim under section 3 of the Dent Act of March 2, 1919.

It is clear that the requisition of the war materials and the conferences and agreements at the time of the requisition concerning the price to be paid to the Netherlands were made prior to November 12, 1918. They related to war supplies which were to be furnished to a foreign government. The agreement between Colonel Boom and General Babbitt that the Netherlands would be reimbursed the *cost* of the materials taken rather than awarded just compensation to be measured by the value of the materials at the time of the requisitioning was just such an oral informal arrangement as is within the scope of this statute. As was stated in 33 Op. 301, in discussing the bearing of this section of the Dent Act upon the Bolling agreement:

"There breathes throughout the Act the intention to permit the Secretary of War to deal with agreements of the character described on a fair and equitable basis and without severe insistence upon the technicalities of the law."

Even if it be assumed that a requisition of such war materials would not in and of itself be sufficient to give the Secretary of War authority under section 3 of the Dent Act to adjust and settle the compensation claimed by the owner of the requisitioned property, the facts of the instant case furnish a proper basis for such an adjustment. This requisition was supplemented by an agreement between the

representatives of the United States and the Netherlands Government. The Netherlands Government decided not to exercise any rights it might have had to receive the value of its property at the date of the requisition, and its claim is now based not on the requisition but rather on the arrangement as to the price to be paid which was made between Colonel Boom and General Babbitt. This arrangement constituted an agreement either express or implied in fact and is therefore clearly within the scope of the Dent Act. *Baltimore & Ohio Railroad Co. v. United States*, 261 U. S. 592. See also *Jurisdiction of Secretary of War to Settle Contracts, etc.*, 1 Board of Contract Adjustment, IX, XIII; *Pomilio Brothers*, 1 B. C. A. 602, 619.

The claim was once reviewed by the Assistant Secretary of War. The Assistant Secretary treated the matter as a request for a revision of the award made by the board of appraisers. In his memorandum the Dent Act was not mentioned or referred to in any way. No hearing of any sort was held upon the claim prior to the decision of the Assistant Secretary. In fact at that time the claim of the Netherlands Government was pending before the Secretary of State rather than before the War Department. It follows that the action taken by Assistant Secretary Wainwright, as indicated in his letter and memorandum dated April 12, 1922, was not an adjustment or adjudication of the claim under section 3 of the Dent Act. Moreover, had it been such an adjustment, the claim might still be reconsidered. The Act directs the making of "equitable and fair adjustments and agreements." Awards under section 1 of the Act may be reopened in order to secure a fair adjustment. 32 Op. 199. *Armour & Co. v. United States*, 67 C. Cls. 519. Reconsideration of claims under section 3 is equally authorized.

My opinion is therefore that your first two questions must be answered in the affirmative and the third question must be answered in the negative.

Respectively,

WILLIAM D. MITCHELL.

To the SECRETARY OF WAR.

CERTIFICATION TO CONGRESS OF SUBROGATED CLAIMS

A claim covering the cost of replacing a plate-glass window presented by an insurance company which has become subrogated to the rights of the owner of the damaged property may properly be certified to Congress, under the Act of December 28, 1922 (42 Stat. 1066), for an appropriation to provide for its payment.

In making the certification, special attention should be called to the fact that it is a subrogation claim by an insurer and also the attention of Congress should be drawn to the point involved so that it may receive deliberate consideration.

DEPARTMENT OF JUSTICE,

June 29, 1932.

SIR: I have the honor to acknowledge your letter of November 3, 1931, in which you request my opinion whether a claim for damages presented to you by Lipman & Esfeld, agents for St. Paul-Mercury Indemnity Company, covering the cost of replacing a plate-glass window on premises owned by Abner Krekoon, in Seattle, Washington, may be certified to Congress for an appropriation to provide for its payment under the Act of December 28, 1922 (42 Stat. 1066; U. S. C., Title 31, sec. 215). The glass was broken by a truck negligently operated by a driver who was at the time of the accident acting within the scope of his employment in the United States Customs Service.

From your letter, and the file accompanying it, I assume that you are satisfied that the glass was replaced by the Insurance Company pursuant to a policy of insurance which obligated the Company to indemnify the owner of the property against such damage. The question, therefore, is whether such a claim, which if made by the owner of the property damaged could have been certified, may properly be certified if made by an insurance company which has become subrogated to the rights of the owner to receive compensation for the damage suffered.

The statute, so far as material, provides:

"That authority is hereby conferred upon the head of each department * * * to consider, ascertain, adjust, and determine *any claim* * * * on account of damages to or loss of privately owned property * * * caused by the negligence of any officer or employee of the

Government acting within the scope of his employment. Such amount as may be found to be due *to any claimant* shall be certified to Congress as a legal claim for payment out of appropriations that * * *."

Looking only at the words of the statute and considering the question without reference to practical construction or prior administrative rulings, I see no reason to doubt that the statute covers the case submitted and requires its certification. The statute by its terms grants authority to determine "any claim" and to certify the amount due "to any claimant." In acting under the statute, the head of a department is required to determine not merely the amount of the claim but the person to whom it is due, and in performing that duty to apply established principles of law. Assuming that such a statute is to be strictly construed because in derogation of the immunity of the sovereignty, a strict construction does not permit reading into the statute something that is not there or disregarding its plain terms. The words of the statute include all claims and all claimants.

Except for its immunity as a sovereign, the Government would have been liable to respond to this claim in a suit brought for the use and benefit of the Insurance Company. (*American Tobacco Co. v. United States*, 166 U. S. 468.) The procedural requirement in some jurisdictions that such suits must be prosecuted in the name of the insured does not qualify the fact that an insurer, having paid the loss, and being subrogated to the rights of the insured, is entitled to have and enjoy the recovery. In equity, payment to the original obligee, after notice of the transfer of the right to receive payment, does not discharge the obligation. (*Monmouth Co. Fire Ins. Co. v. Hutchinson et al.*, 21 N. J. Eq. 107, 117; *Sheldon, Subrogation*, sec. 231.) This being true, the claim, upon subrogation, necessarily becomes "due" to the subrogee. The practice in some States not only permits but requires insurance companies to prosecute such claims in their own names, as the real parties in interest.

Bearing these principles in mind, it seems entirely clear that upon payment of the damage by an insurance company, and proof of this fact, you would upon plain principles of law be required to recognize the insurance company

as the claimant to whom the amount of the adjusted claim is due, within the meaning of the statute.

Nothing in the legislative history of the Act of December 28, 1922, indicates that Congress intended to bar insurance companies from securing relief under the statute. The various committee reports¹ do not discuss any phase of the problem. Certain statements in the debate in the House² show that the Members of Congress expected claims to be presented by the owners of the damaged property rather than by their tenants, but there is no suggestion that the broad terms of the Act were not intended to grant relief to claimants who under insurance contracts might become subrogated to the rights of the owners.

In 13 Op. 182 (1870) the conclusion was reached that recovery could be allowed to an insurance company which by subrogation had acquired rights against the United States. That opinion concerned the construction of R. S. 3483 (U. S. C., Title 31, sec. 209) under which "every person who sustains damage by the capture or destruction * * * of any * * * vessel, railroad-engine or railroad-car while such property is in the military service * * * shall be allowed and paid the value thereof * * *." The same case considered by the Attorney General came before the courts. Suit was brought in the Court of Claims by the insurance companies in the name of the owner whom they had reimbursed for damage to a vessel impressed into service, and it was held that the action was maintainable by them. (*Shaw v. United States*, 8 C. C's. 488.) After further proceedings (9 C. C's. 301, 388, affirmed, 93 U. S. 235) recovery was denied because the vessel was in the possession of her owner, performing his contract at his risk, and under these circumstances the statute did not allow recovery.

In *American Tobacco Co. v. United States* (32 C. C's. 207, aff'd. 166 U. S. 468) recovery was granted to insurance companies suing in the name of their insured under R. S. 3426 (U. S. C., Title 26, section 1174) for the value of

¹ 67th Cong. Sess. 1, House Report 342 (Serial 7921) ;

67th Cong. Sess. 2, Senate Report 850 (Serial 7951) ;

67th Cong. Sess. 2, House Report (Conference) 1255 (Serial 7957).

² Cong. Record, Vol. 62, Part 3, page 2298.

unused internal revenue stamps destroyed by fire. This action was under a statute limiting recovery to the *owner* of the property lost. The statute now under consideration provides for certification of the amount "found to be due to any claimant."

These conclusions are not affected by the provisions of section 3477 of the Revised Statutes (Title 31, U. S. Code, sec. 203), which declares transfers and assignments of claims upon the United States to be null and void unless executed with certain formalities, after the issuing of a warrant for the payment of the claim. (*American Tobacco Co. v. United States*, 32 C. Cls. 207, 223, aff'd. 166 U. S. 468.) This statute applies only to cases of voluntary assignment of demands against the Government, and does not embrace transfers of title by operation of law. (*Western Pacific R. Co. v. United States*, 268 U. S. 271, 275, and cases cited.) Subrogation is a transfer by operation of law of the right to receive payment of the amount due. (*Connecticut Mutual Life Ins. Co. v. Cornwell*, 72 Hun. 199, 201 (App. Div. N. Y.); *Meyer v. Florida Home Finders*, 90 Fla. 128, 130; *Erwin v. Brooke*, 159 Ga. 683, 685; *In re Freeman & Brooks*, 1 Fed. (2d) 430, 434 (C. C. A. 7), certiorari denied 266 U. S. 628, and cases cited.)

Investigation of the practice of the executive departments discloses considerable conflict and confusion in dealing with this subject. In a ruling upon a similar question arising under the Act of July 11, 1919 (41 Stat. 131), the text of which differs only slightly from the statute here involved, the Comptroller General reached the conclusion that subrogation claims by insurers should not be recognized. He disposed of the question by saying:

"The benefits of the statute constitute an exception to the common law rule that the Government is not responsible for the torts of its agents. It discloses no intent to reimburse these who by reason of their contractual liability have made good a damage sustained for which there might be a claim under the statute by the injured party."

The practice of the executive departments under the Act of December 28, 1922, is not consistent. I am informed that under the Act of 1922 no case has arisen presenting this

question in either the Department of Commerce, the Department of Justice, or the Department of State, and that the question has not arisen heretofore in the Treasury Department. The War Department, the Department of the Interior, the Department of Agriculture, and the Veterans' Administration report that they have construed the Act of 1922 so as not to include subrogation claims by insurers and it has not been their practice to certify such claims for payment. On the other hand, the Post Office Department, the Navy Department, and the Department of Labor report that they have taken the other view and it has been their consistent practice to certify such claims for payment.

The rulings adverse to the allowance of such claims seem to be based on a reluctance to pay out Government funds in satisfaction of a claim where an insurance company has been paid a premium to carry the risk, rather than upon anything contained in the words of the statute. Furthermore, it is quite evident that the mere denial of subrogation claims presented by insurers does not meet the situation. Anyone familiar with insurance practice knows that policies of insurance contain a variety of provisions respecting subrogation. If the loss is only partially covered by insurance, it is commonly provided that the insured shall prosecute the claim in his own name for the full loss sustained, accounting to the insurance company only for that part of the recovery equal to the amount of the insurance. In other cases, although the loss may be fully covered, the insured is required to prosecute the claim in his own name but for the account of the insurance company. Often it will happen that a claim prosecuted by the owner of damaged property is wholly or in part for the benefit of an insurer and unless in every case the claimant is required to disclose whether he carried insurance, and the principle is applied that he will not be reimbursed by the Government to the extent that his claim is covered by collectible insurance, a discrimination would result in the treatment of those subrogation claims presented by the insured, in whole or in part for the benefit of an insurer, as compared with claims presented directly by insurance companies.

Merely refusing claims presented by an insurer would not meet the situation. To be consistent, it is necessary to go further and read into the statute a provision that any claim presented by the owner of damaged property will be disallowed to the extent that the loss is covered by collectible insurance. The War Department, the Department of Agriculture, the Department of the Interior, and the Veterans' Administration, which refuse to certify claims covered by insurance, have recognized these conditions, and, in each case where the owner of the property makes the claim, require him to disclose whether his loss was covered by insurance in whole or in part and the amount of the insurance, and decline to certify claims for payment to the extent that they are covered by insurance.

Standard Form No. 28, for use in presentation of such claims, contains a question calling for the disclosure of information respecting insurance. It thus appears that to carry out the principle contended for in the Comptroller General's decision and in the rulings of the three executive departments and the independent establishment which have refused certification of insured losses, the statute should have contained a provision that the Government shall have the benefit of any insurance carried by the claimant, and no claim shall be certified to the extent covered by collectible insurance. To read such a provision into this statute seems to me to be stretching the rule of strict construction to the breaking point. Nevertheless, because the Comptroller General in 1927 construed a similar statute not to allow payment of insured losses, and his decision under that statute has apparently been acquiesced in, I would be disposed to lay aside my views as to the plain meaning of the Act of 1922 and adopt the same view that the Comptroller General did with respect to the Act of 1919, were it not for one further consideration. It appears that whenever subrogation claims of insurers have been certified by the Post Office Department, the Department of Labor, and the Navy Department through the Bureau of the Budget to Congress for payment, the record laid before Congress has clearly disclosed in every case the nature of the claim and the fact that it was a subrogation claim by an insurer, and in every

such case Congress without question has recognized the claim as a proper one for certification under the Act of 1922 and appropriated the money to pay it; and that a very large proportion of all claims arising under the Act of 1922 have arisen in the Post Office Department.

As the ultimate question is the intention of Congress, this practical construction by the legislative body is impressive. Our objective being to ascertain the purpose of Congress in the enactment of this statute, and since no claim may be paid under the statute until it has been certified to Congress and an appropriation made for that purpose, a ready means is afforded of obtaining a final and conclusive legislative construction. By refusing certification we might obtain ultimately a judicial determination of the question through a mandamus suit brought by some claimant to compel certification of his claim, but that would involve expense and delay, and the sensible course is to have the question cleared up by legislation or by legislative action amounting to a conclusive legislative construction.

For these reasons I believe the practical course is to resolve any doubts by construing the statute to require certification, thus giving the Congress an opportunity to consider and decide whether it intended by this statute that such claims should be paid. In making the certification special attention should be called to the fact that it is a subrogation claim by an insurer and the attention of Congress should be drawn to the point involved so that it may receive deliberate consideration.

Respectfully,

WILLIAM D. MITCHELL.

To the SECRETARY OF THE TREASURY.

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FIDUCIARY BONDS, SUCCESSIVE. *See* BONDS, 2.

AIR COMMERCE ACT.

Publication of causes of aircraft accidents.—The course followed by the Secretary of Commerce in making public the causes of accidents in civil air navigation, with respect both to the manner and time of publication, as herein outlined, has been within the limits of the discretion vested in him and in substantial compliance with the requirements of the Air Commerce Act of 1926 (44 Stat. 568). 182.

AIR MAIL SERVICE.

VALIDITY OF CONTRACT. *See* CONTRACTS. 1.

AIRCRAFT ACCIDENTS.

CAUSES, PUBLICATION. *See* AIR COMMERCE ACT.

AIRPLANES.

Estimates for appropriations.—The War Department, in preparing estimates for future appropriations, is justified in treating as unserviceable, and exclusive of the 1,800 serviceable airplanes authorized by section 8 of the Air Corps Act of July 2, 1926 (44 Stat. 783), those in a condition which require general overhauling and repair at the Air Corps depots. 418.

ALASKA.

AGRICULTURAL MARKETING ACT. *See* AGRICULTURAL MARKETING ACT, 1.

ALASKA GAME COMMISSION.

BOND OF DISBURSING OFFICER. *See* BONDS, 2.

ALIEN PROPERTY CUSTODIAN.

CERTAIN PAYMENTS TO BE CREDITED TO MIXED CLAIMS COMMISSION. *See* MIXED CLAIMS COMMISSION.

ALIENS.

FOREIGN BORN CHILDREN OF ALIEN PARENTS. *See* CITIZENSHIP, 2, 5.

ALL-AMERICAN CANAL.

CONSTRUCTION COSTS. *See* BOULDER CANYON PROJECT ACT, 1.

ANTITRUST LAWS.

CLAYTON ACT. *See* CONTRACTS, 2, 3.

APPOINTMENTS.

MEMBERS OF FEDERAL POWER COMMISSION. *See* FEDERAL POWER COMMISSION.

RETIRED ARMY OFFICER, ELIGIBILITY TO FILL CERTAIN CIVIL POSITIONS. *See* DISTRICT OF COLUMBIA.

APPROPRIATIONS.

AIRPLANE ESTIMATES. *See* AIRPLANES.

ARIZONA.

STATE LICENSES FOR MOTOR TRUCKS, GRAND CANYON NATIONAL PARK. *See* LICENSES, 1-3.

ARMY.

Officers.—Eligibility of retired Army officer for the office of Commissioner of the District of Columbia.—A retired Army officer, who has the qualifications of citizenship and residence specified in section 2 of the Act of June 11, 1878 (20 Stat. 103), is eligible for appointment to the office of Commissioner of the District of Columbia. 388.

CONTRACTS FOR TRANSPORTATION OF SUPPLIES. *See* **BILLS OF LADING**, 1.

ENLISTED MEN. *See* **ARTICLES OF WAR**.

OFFICERS, RETIREMENT. *See* **EMERGENCY OFFICERS RETIREMENT ACT**, 1.

OFFICERS, TEXAS NATIONAL GUARD. *See* **EMERGENCY OFFICERS RETIREMENT ACT**, 2.

ARTICLES OF WAR.

Construction of 107th article requiring enlisted men to make good time lost.—Private Floyd Ellis and Private Ward B. Waits, enlisted men, had been absent on 24-hour passes and were returning to their station on a two-seated motor cycle belonging to Ellis, several hours after expiration of the 24-hour period, when the lights of the motor cycle suddenly failed, causing Ellis to lose control of the machine, which ran into a fence along the road, injuring both men and thereby rendering them unable for more than one day to perform duty. *Held*, that the injuries sustained by Privates Ellis and Waits were not the result of their own misconduct within the meaning of the provision of the 107th Article of War, requiring enlisted men to make good time lost. 478.

ASPHALT DEPOSITS. *See* **LANDS**, 6.

ASSIGNMENT:

REGISTERED BOND, BY MINOR'S NATURAL GUARDIAN. *See* **BONDS**, 1.

ATACHAFALAYA BASIN.

FLOWAGE RIGHTS, MISSISSIPPI FLOOD CONTROL. *See* **MISSISSIPPI FLOOD CONTROL**, 2.

ATTORNEY GENERAL.

1. **Administrative questions.**—Minor administrative questions should be worked out in the respective departments without formal opinions from the Attorney General. 520.
2. **Hypothetical questions.**—The Attorney General is not authorized to render an opinion upon the question whether there would be any constitutional objection to the enactment by Congress of legislation requiring telegraph and cable companies to furnish to the Government for transmission to foreign countries copies of telegrams and cablegrams relating to the smuggling of narcotic drugs, because the question is hypothetical; and also because the Secretary is not required to

ATTORNEY GENERAL—Continued.

determine the constitutional power of Congress in such legislative field. 21.

3. Questions involving conflict of judicial opinion.—The Attorney General declines to render an official opinion as to whether the Secretary of War may lawfully make shipments of Government property under the standard form of the Government bill of lading with clause 7, as prescribed by Regulation 69 of the Comptroller General, eliminated therefrom, and thus impose upon the Government's right to sue the carrier the limitations which are contained in the commercial bills of lading approved by the Interstate Commerce Commission, for the reason that upon this question there is conflict of judicial decision, the Department having repeatedly refused to render opinions which might bring it into conflict with a judicial tribunal. 289.

4. Questions of fact.—**Navigability of a particular stream.**—In dealing with applications for licenses under Federal Water Power Act the Federal Power Commission is required to determine the fact of navigability of any given stream. The Attorney General renders opinions only on questions of law, and it would not be in accordance with precedents to submit to him a statement of the evidence and ask for his opinion as to the navigability of a particular stream. 314.

5. Questions pending before the courts.—The attorney General declines to express an opinion upon the question whether the United States is required to provide compensation for flowage rights in the Boeuf and Atachafalaya Basins, as litigation involving this precise question is now pending in the Federal courts. 80.

6. Railroad mergers.—The Attorney General feels obliged to refrain from responding to a request from the Senate for his opinion respecting the legality of recent railroad mergers, since the Federal statutes do not authorize, empower, or require him to give opinions to either House of Congress or to the committees thereof. 532.

OPINIONS TO SENATE AND HOUSE UNAUTHORIZED. *See* ATTORNEY GENERAL, 6.

RECOMMENDS MODIFICATION OF CONSTRUCTION OF DUTIES ON LEAD-BEARING ORES AND COPPER MATTES. *See* CUSTOMS LAWS, 2.

AVIATION.

CAUSES OF CIVIL AIRCRAFT ACCIDENTS. *See* AIR COMMERCE ACT.

AWARDS.

MIXED CLAIMS COMMISSION. *See* MIXED CLAIMS COMMISSION.

BAIL RECOGNIZANCES, FORFEITED. *See* COMPROMISE.

BANKS AND BANKING.

AMENDMENTS TO NATIONAL BANK ACTS AND FEDERAL RESERVE ACT. *See* NATIONAL BANKS, 1, 2, 4.

BRANCH BANKS. *See* FEDERAL RESERVE SYSTEM, 1, 2.

CONSOLIDATION OF CERTAIN BANKS, HAWAII. *See* NATIONAL BANKS, 3.

MEMBER BANKS. *See* FEDERAL RESERVE SYSTEM, 1, 2.

NATIONAL BANKING ASSOCIATIONS, BRANCH BANKS. *See* NATIONAL BANKS, 5, 6.

BIDS.

TRANSPORTATION OF MAIL. *See* CONTRACTS, 1.

BILLS, LEGISLATIVE.

APPROVAL BY PRESIDENT AFTER ADJOURNMENT OF CONGRESS. *See* CONGRESS.

BILLS OF LADING.

1. There is nothing contained in General Regulations No. 69 of the Comptroller General which can prohibit the exercise of the authority of the Secretary of War to negotiate lawful contracts for the furnishing of "means of transportation of all classes and kinds required by the Army." 289.
2. The promulgation of Regulation 69 in so far as it interferes with the exercise of the statutory authority granted to the Secretary of War is not an exercise of the power to make regulations for accounting purposes granted to the Comptroller General, but is in effect an attempt to limit the authority of the Secretary of War, expressly granted by Act of Congress, and therefore, to this extent at least, is invalid. 289.
3. The Attorney General declines to render an official opinion as to whether the Secretary of War may lawfully make shipments of Government property under the standard form of the Government bill of lading with clause 7, as prescribed by Regulation 69 of the Comptroller General, eliminated therefrom and thus impose upon the Government's right to sue the carrier the limitations which are contained in the commercial bills of lading approved by the Interstate Commerce Commission, for the reason that upon this question there is conflict of judicial decision, the Department having repeatedly refused to render opinions which might bring it into conflict with a judicial tribunal. 289.

BOEUF BASIN.

FLOWAGE RIGHTS, MISSISSIPPI FLOOD CONTROL. *See* MISSISSIPPI FLOOD CONTROL, 2.

BONDS.

1. Issuance of duplicate in lieu of stolen United States registered bond—A United States bond registered in the name of a minor and bearing an assignment executed by the minor's natural guardian in favor of the "Secretary of the Treasury

BONDS—Continued.

for exchange," was stolen from a bank having custody of same, held that the assignment of the bond was invalid and because of such invalid assignment a subsequent transferee of the bond can not obtain title to the same, for in contemplation of law the bond remains untransferred and retains its character as a registered bond and the protection of registration; and that, under such circumstances, the Secretary of the Treasury is authorized by section 3704 of the Revised Statutes to issue a duplicate in lieu of the stolen bond. 64.

2. **Official bonds**—The Secretary of Agriculture in the exercise of his discretion having fixed the bond of the regional fiscal agent, United States Department of Agriculture, Juneau, Alaska, at \$25,000 and thereafter, pursuant to section 14 of the Act of February 14, 1931 (46 Stat. 1114), consolidating the duties of said regional fiscal agent and those of the disbursing officer for the Alaska Game Commission, having required as security for the faithful performance of such additional duties an increase of \$20,000 in the bond of said regional fiscal agent, the question whether the second bond discharged the sureties on the first bond for defaults occurring subsequent to the execution of the second bond depends upon whether the Secretary intended the latter to be a substitute for the first, such intention to be determined from the terms of the instrument, construed in the light of the applicable statutes and surrounding circumstances. 520.

3. **Same.**—Minor administrative questions of this kind should be worked out in the respective departments without formal opinions from the Attorney General. 520.

LEGALITY OF ISSUE. *See* PHILIPPINE ISLANDS, 1-6; PORTO RICO, 1-7.

BONUS.

UNCOLLECTED, LAPSED WAR RISK INSURANCE. *See* WORLD WAR VETERANS' ACT, 4.

BOULDER CANYON PROJECT ACT.

1. **All-American Canal.**—Construction Costs.—Under the provisions of the Boulder Canyon Project Act (45 Stat. 1057) advances from the General Treasury to the Colorado River Dam fund for construction costs of the All-American Canal are not interest bearing. 121.
2. **Boulder dam.**—Amortization of amount allocated to flood control.—The Secretary of the Interior is not required, in fixing the sale rates for power to be generated at Boulder Dam, to make provision for the amortization within the fifty years of the \$25,000,000 allocated by the Boulder Canyon Project Act to flood control. 121.

BOULDER CANYON PROJECT ACT—Continued.

3. **Same.**—Payment of interest on money allocated to flood control.—The Boulder Canyon Project Act does not require the Secretary of the Interior to make provision for the payment out of the power proceeds, during the fifty-year period of amortization, of interest on the \$25,000,000 allocated by said act to flood control. 121.
4. **Colorado River compact.**—Ratification by Utah.—The ratification of the Colorado River compact by the State of Utah conforms to the requirements of the applicable provisions of the Boulder Canyon Project Act. (45 Stat. 1057.) 72.
5. **Contracts.**—The contract for lease of power privilege, under section 4 (b) of the Boulder Canyon Project Act (45 Stat. 1059), herein set forth, between the United States, the City of Los Angeles, its Department of Water and Power, and the Southern California Edison Company, Ltd., is a valid agreement which is binding upon the said Edison Company, and also upon the City of Los Angeles and its said department to the extent to which funds are available under the provisions of the charter to that department. 270.
6. **Same.**—All the requirements of section 4 (b) of the Boulder Canyon Project Act which are made conditions precedent to the appropriation of money, the making of contracts, and the commencement of work for the construction of a dam and power plant in Boulder Canyon have been fully met and performed by the Secretary of the Interior in securing contracts which in his judgment are adequate for the purposes specified in said section of the Act. 270.

BOULDER DAM. *See* BOULDER CANYON PROJECT ACT, 1, 2, 4.

CABINET OFFICERS.

HOLDING OFFICE AFTER EXPIRATION OF TERM OF PRESIDENT BY WHOM APPOINTED. *See* TREASURY, SECRETARY OF.

CABLEGRAMS.

COPIES, RELATING TO SMUGGLING OF NARCOTIC DRUGS. *See* NARCOTIC DRUGS, 2, 3.

CALIFORNIA.

REVESTED RAILROAD LAND GRANTS. *See* LANDS, 7.

CAMPS.

STATE CAMP FOR VETERANS, N. Y. *See* LEASES, 5.

CANALS.

ALL-AMERICAN CANAL. *See* BOULDER CANYON PROJECT ACT, 1.

CHICAGO SANITARY DISTRICT DRAINAGE CANAL. *See* WATERWAYS.

CAPPER-VOLSTEAD ACT. *See* AGRICULTURAL MARKETING ACT, 3.

CENSUS BUREAU.

Data unavailable to Women's Bureau of Department of Labor and Individuals.—It is the duty of the Director of the Census to decline to furnish the Women's Bureau of the Department

CENSUS BUREAU—Continued.

of Labor with the names, addresses, occupations, and status of employment of workers in the city of Rochester, N. Y., for use in connection with a contemplated survey to ascertain the economic effects upon family and community life of the employment of women in industry; and it is likewise his duty to decline to furnish various individuals and associations interested in public education and the eradication of illiteracy with the names and addresses of persons unable to read and write. 362.

CERTIFICATION OF CLAIMS TO CONGRESS. *See CLAIMS AGAINST THE UNITED STATES, 1, 2.*

EMPLOYEES BEYOND RETIREMENT AGE. *See CIVIL SERVICE, 2, 3.*

CHICAGO SANITARY DRAINAGE CANAL. *See WATERWAYS.***CHICKASAW NATION, OKLA.**

COAL AND ASPHALT DEPOSITS ON LANDS. *See LANDS, 6.*

CHILDREN.

DISTRICT OF COLUMBIA CHILD LABOR LAW NOT APPLICABLE TO GOVERNMENT PRINTING OFFICE. *See GOVERNMENT PRINTING OFFICE.*

FOREIGN-BORN, OF ALIEN PARENTS. *See CITIZENSHIP, 2.*

CHOCTAW NATION, OKLA.

COAL AND ASPHALT DEPOSITS ON LANDS. *See LANDS, 6.*

CITIZENSHIP.

1. Ingrid Therese Tobiassen.—Ingrid Therese Tobiassen, a minor, who was born in the United States and whose father, after becoming a citizen of the United States by naturalization, took her to Norway, his native country, where he established and has ever since maintained a permanent residence, has acquired Norwegian nationality through the naturalization of her father as a Norwegian subject, and consequently she has ceased to be an American citizen. 535.
2. R. Bryan Owen.—One R. Bryan Owen, whose mother was originally a citizen of the United States and whose father was a British subject, was born in England on April 14, 1913, and came to the United States with his parents in 1919, where he has continuously resided ever since. His mother became naturalized in 1925, and his father, who was never naturalized, died in 1927. *Held* that, if the said R. Bryan Owen did not acquire a citizenship status at the time of his mother's naturalization, there can be no doubt that he is now a citizen of the United States by reason of his father's death and the other existing conditions herein specifically mentioned, in accordance with the unequivocal terms of section 5 of the Act of March 2, 1907 (34 Stat. 1229). 197.

CITIZENSHIP—Continued.

3. **Seamen on American vessels engaged in the ocean mail service.**—Seamen who have filed their declarations of intention to become citizens of the United States and have served three years upon merchant vessels of the United States of more than twenty tons burden, are deemed citizens of the United States within the requirements of section 405 (c) of the Merchant Marine Act, 1928 (45 Stat. 693). 1.
4. **Same.**—In prescribing that a certain proportion of the crew of vessels employed in ocean mail service under the Merchant Marine Act, 1928, shall be "citizens of the United States," Congress used that phrase as it had itself defined it in applicable existing laws, notably the Naturalization Act. 1.
5. **Wife and minor child of Pietro Mariani.**—Pietro Mariani, a native of Italy, was regularly admitted to the United States in 1913 and was naturalized in 1919. Within five years after his naturalization he went to Italy with an American passport. While there he married, in 1921, and a child was born in 1923. Because of his long absence from the United States, his certificate of naturalization was canceled under section 15 of the Naturalization Act of June 29, 1906 (34 Stat. 601). In 1926 Mariani returned to the United States as an alien under the provisions of the Act of May 26, 1926 (44 Stat. 654), extending naturalization privileges to certain alien veterans of the World War, and he was naturalized again in 1929. *Held*, under the circumstances herein stated, that the wife of Mariani and his child born in Italy in 1923 are not citizens of the United States. 446.

NATIVE BORN CHILD OF PARENTS REACQUIRING NORWEGIAN CITIZENSHIP. *See* CITIZENSHIP, 1.

CIVIL SERVICE.

1. **Retirement act.**—**Case of Mrs. Katherine A. Gaines.**—Section 6 of the Act of May 29, 1930 (46 Stat. 468, 472), providing disability retirement for employees having served five years, is not to be interpreted as authorizing the retirement of Mrs. Katherine A. Gaines, who entered the civil service of the United States in 1917 and continued in such service for nearly thirteen years, but whose service with the Government was terminated prior to the passage of said Act, *supra*. 495.
2. **Same.**—**Certification of employees for service beyond retirement age.**—By section 2 of the Act of May 29, 1930 (46 Stat. 469), providing for certification of Government employees for service beyond the retirement age, the responsible officer is required, upon being satisfied that the applicant is physically fit and has been efficient and competent during the two years next

CIVIL SERVICE—Continued.

preceding his application for continuance in the civil service, to certify to the Civil Service Commission that the continuance of such employee would be advantageous to the public service. This he must do "as of course" upon acceptable proof of the applicant's physical fitness and a showing of his efficiency and competency based upon the information specified in the statute. 430.

3. **Same.**—Where the Civil Service Commission approves and certifies the continuance of an employee in the service, it must grant an extension for two years. 430.

CIVIL SERVICE COMMISSION.

EXTENSION OF TIME OF SERVICE, FEDERAL EMPLOYEES. *See* **CIVIL SERVICE, 3.**

CLAIMS AGAINST THE UNITED STATES.

1. **Certification to Congress of subrogated claims.**—A claim covering the cost of replacing a plate-glass window presented by an insurance company which has become subrogated to the rights of the owner of the damaged property may properly be certified to Congress, under the Act of December 28, 1922 (42 Stat. 1066), for an appropriation to provide for its payment. 553.
2. **Same.**—In making the certification, special attention should be called to the fact that it is a subrogation claim by an insurer and also the attention of Congress should be drawn to the point involved so that it may receive deliberate consideration. 553.
3. **War Minerals Relief Acts.**—**Claim for interest paid on borrowed money.**—The claim of Logan Rives under the War Minerals Relief Acts for interest paid on borrowed money for use in operation, which claim was not included in Rives's original application and which was not presented to or considered by the then Secretary of the Interior, should not, under the circumstances herein stated, be allowed. 541.
4. **Same.**—The Secretary of the Interior should not reopen final decisions of his predecessors under the War Minerals Relief Acts except in those cases in which resort was had to the courts under the amendment of February 13, 1929 (45 Stat. 1166), and then only to the extent directed by the courts. 541.
5. **Same.**—**Claim of the Netherlands Government under section 3 of the Dent Act.**—The agreement made between the representatives of the United States and the Netherlands Government concerning the price to be paid to the Netherlands Government for war materials taken over by the United States in 1917, which were to be furnished to a foreign government, is within the purview of section 3 of the Dent Act (40 Stat. 1273). 547.

CLAIMS AGAINST THE UNITED STATES—Continued.

6. **Same.**—The claim, arising out of the agreement to adopt as a basis for ascertaining just compensation the costs of the supplies in lieu of the market value, is within the scope of section 3 of the Dent Act, *supra.* 547.
7. **Same.**—The action taken by Assistant Secretary Wainwright, as indicated in his letter and memorandum of April 12, 1922, was not an adjustment or an adjudication of this claim under section 3 of the Dent Act, *supra.* 547.

CLAIMS OF UNITED STATES.

COMPROMISE IN FAVOR OF GOVERNMENT. *See* COMPROMISE.

CLAYTON ACT.

SEC. 3. *See* CONTRACTS, 2.

COAL DEPOSITS. *See* LANDS, 6.

COASTWISE TRADE. *See* VESSELS, 1, 2.

COCA LEAVES.

DERIVATIVE, TROPACOCAINE HYDROCHLORIDE. *See* NARCOTIC DRUGS, 1.

COLLEGES.

AGRICULTURAL LAND GRANT. *See* MILITARY TACTICS.

COLORADO RIVER COMPACT. *See* BOULDER CANYON PROJECT ACT, 4.

COLORADO RIVER DAM. *See* BOULDER CANYON PROJECT ACT, 1, 4.

COMMERCE DEPARTMENT.

PURCHASE OF CARDS FOR TABULATING MACHINES. *See* CONTRACTS, 2, 3.

VALIDITY OF CONTRACT FOR RENTAL OF TABULATING MACHINES. *See* CONTRACTS, 2.

COMMERCE, SECRETARY OF:

COMPUTATION OF NATIONAL ORIGINS QUOTA. *See* IMMIGRATION.

PUBLICATION OF CAUSES OF AIR ACCIDENTS. *See* AIR COMMERCE ACT.

COMPENSATION.

INJURY RESULTING FROM HOSPITALIZATION. *See* WORLD WAR VETERANS' ACT, 5, 6.

INTERNATIONAL FISHERIES COMMISSION EMPLOYEES. *See* FEDERAL EMPLOYEES' COMPENSATION ACT, 1.

PAYMENT FOR FLOWAGE RIGHTS. *See* MISSISSIPPI FLOOD CONTROL, 1.

RECEIPTS BY VETERAN NO BAR TO DISABILITY ALLOWANCE. *See* WORLD WAR VETERANS' ACT, 8.

COMPROMISE.

Final judgments.—The Secretary of the Treasury has no authority under section 3469 of the Revised Statutes to accept the offer of the Great American Indemnity Company in compromise of certain final judgments recovered by the United

COMPROMISE—Continued.

States against the surety company upon forfeited bail recognizances, there being no doubt as to the entire collectibility of these judgments. 40.

COMPTROLLER GENERAL.

CUSTODY OF INSURANCE POLICIES FURNISHED WAR DEPARTMENT. *See* LEASES, 4.

GENERAL REGULATIONS 69. *See* BILLS OF LADING, 1-3.

COMPTROLLER OF CURRENCY.

ESTABLISHMENT OF BRANCH BANKS. *See* NATIONAL BANKS, 5, 6.

CONGRESS.

Approval of bills after adjournment of Congress.—The President has the power to approve bills after the final adjournment of Congress, provided he acts within 10 days, Sundays excepted, after the bills have been presented to him. 403.

CLAIMS AGAINST THE UNITED STATES, CERTIFICATION. *See* CLAIMS AGAINST THE UNITED STATES, 1, 2.

CONTROL AND REGULATION OF NAVIGATION. *See* WATERWAYS.

CONTRACTS.

1. **Validity of contract awarded by Government to Pan American-Grace Airways, Inc.**—A contract was awarded by the Postmaster General to the Pan American-Grace Airways, Inc., for the transportation of mail from the Canal Zone to points in South America and return, which contract was authorized by the Act of March 2, 1929 (45 Stat. 1449) and was awarded after that Act became effective, but the bids for this specific service were invited and received prior to the passage of said Act authorizing the contract. *Held*, under the circumstances of this case, that the course followed in securing bids was in substantial compliance with the requirements of law and within the limits of discretion vested in the Postmaster General, and that the contract is valid. 33.
2. **Validity of proposed Government contract for the rental of tabulating machines.**—The proposed contract between the Department of Commerce and the Remington-Rand Company for the rental of 42 tabulating machines at \$1,850 per month, the contract stipulating that said rental is based upon the understanding that all cards used with the equipment shall be purchased from the lessor and that if such cards are not purchased from the lessor the machine rentals shall be \$2,170 per month, is illegal in respect of the restriction upon the purchase and use of cards, which is in violation of section 3 of the Clayton Act. 524.
3. **Same.**—The execution of the proposed contract will not impose upon the Department of Commerce any legal obligation to refrain from purchasing cards from other sources, or to pay the increased rental for doing so. 524.

CONTRACTS—Continued:

LEASE OF WATER POWER PRIVILEGE. *See* BOULDER DAM PROJECT ACT, 5, 6.

TRANSPORTATION OF SUPPLIES FOR ARMY. *See* BILLS OF LADING, 1.

CONVEYANCE OF FEE WITH RESERVED RIGHTS. *See* LANDS, 5.

COOPERATIVE ASSOCIATIONS. *See* AGRICULTURAL MARKETING ASSOCIATION, 2, 3.

CREWS OF VESSELS.

CITIZENSHIP, OCEAN MAIL SERVICE. *See* CITIZENSHIP, 4.

CRIMES AND OFFENSES.

CONVICTION, NAVAL OFFICERS DISMISSED FROM SERVICE. *See* NAVY, 1.

FALSE STATEMENTS MADE BY VOCATIONAL TRAINEE. *See* WORLD WAR VETERANS' ACT, 7.

CUMBERLAND FALLS.

POWER PROJECT. *See* NAVIGABLE WATERS, 1-5.

CURRENCY, COMPTROLLER OF.

ESTABLISHMENT OF BRANCH BANKS. *See* NATIONAL BANKS, 1, 2, 4-6.

CUSTOMS LAWS.

1. **Duty on lead-bearing ores and copper mattes.**—The duty which the Secretary of the Treasury is authorized to impose upon the lead contained in copper, gold and silver ores, or copper mattes, as enumerated in the proviso of par. 391 of the Tariff Act of 1930 (46 Stat. 628), must be based only upon the amount of lead actually recovered in smelting or refining. 513.
2. **Same.**—The former construction by the Secretary of the Treasury of the proviso to par. 392 of the Tariff Act of 1922 (42 Stat. 887), which now applies to par. 391 of the Tariff Act of 1930, *supra*, is erroneous in applying the duty on lead from copper matte in accordance with the assay estimate of the lead content thereof, and accordingly the Attorney General recommends that such construction in this respect be modified. 513.
3. **Port of Tia Juana.**—Validity of order of Treasury Department fixing the closing hour.—The order of the Treasury Department of October 28, 1926, closing the Port of Tia Juana at 6.00 p. m., having for its object the enforcement of the customs laws against smuggling, is a reasonable and valid regulation under section 251 of the Revised Statutes, which has the force and effect of law, provided said order had the personal approval of the Secretary of the Treasury. 510.
4. **Same.**—As such an order is a valid regulation having the force and effect of law, customs guards can legally detain persons who insist upon entering the United States after the port of Tia Juana has been closed. 510.

DAMS.

CONSTRUCTION COSTS. *See* BOULDER CANYON PROJECT ACT, 1-3.

CUMBERLAND RIVER. *See* NAVIGABLE WATERS, 1-5.

LEASE OF POWER PRIVILEGES. *See* BOULDER CANYON PROJECT ACT, 5, 6.

NEW RIVER, VA. *See* WATER POWER PROJECT, 1, 2.

DENT ACT.

CLAIM OF NETHERLANDS GOVERNMENT. *See* CLAIMS AGAINST THE UNITED STATES, 5-7.

INTEREST PAID ON BORROWED MONEY. *See* CLAIMS AGAINST THE UNITED STATES, 3.

DEPUTY COMMISSIONERS. *See* FEDERAL EMPLOYEES' COMPENSATION ACT, 2.

DISABILITY ALLOWANCE. *See* WORLD WAR VETERANS' ACT, 8.

DISABILITY COMPENSATION. *See* PENSIONS, 6-9.

DISTRICT OF COLUMBIA.

Commissioners—Eligibility of retired Army officer for the office of Commissioner.—A retired Army officer, who has the qualifications of citizenship and residence specified in section 2 of the Act of June 11, 1878 (20 Stat. 103), is eligible for appointment to the office of Commissioner of the District of Columbia. 388.

CHILD LABOR LAW NOT APPLICABLE TO GOVERNMENT PRINTING OFFICE. *See* GOVERNMENT PRINTING OFFICE.

COMMISSIONER, ELIGIBILITY OF RETIRED ARMY OFFICER. *See* ARMY.

DRUGS.

INTERNATIONAL TRANSACTIONS. *See* NARCOTIC DRUGS, 2, 3.

SYNTHETICALLY PREPARED. *See* NARCOTIC DRUGS, 1.

DUPLICATE BONDS. *See* BONDS, 1.

EMERGENCY ADJUSTED COMPENSATION ACT.

Loans to veterans on adjusted service certificates.—The Emergency Adjusted Compensation Act, 1931 (46 Stat. 1429), does not authorize the making of loans to veterans on adjusted service certificates which have been in effect less than two years. 435.

EMERGENCY OFFICERS RETIREMENT ACT.

1. **Application of Edward Vollrath for retirement.**—Edward Vollrath on May 23, 1929, deposited in the post office at Bucyrus, Ohio, a registered letter containing his formal application for retirement, under the Emergency Officers' Retirement Act of May 24, 1928, addressed to the regional office of the United States Veterans' Bureau at Cleveland, Ohio, which was received in the post office at Cleveland, Ohio, at 8.15 a. m. on May 24, 1929, but was not received in the bureau's regional office in that city until the morning of May 25, 1929. *Held*, that Vollrath's application was not received in the United States

EMERGENCY OFFICERS RETIREMENT ACT—Continued.

Veterans' Bureau within twelve months after the passage of the Emergency Officers' Retirement Act, as required by section 2 of said Act; and that there is no ground upon which it may be held that the Veterans' Bureau is authorized to consider it. 227.

2. **Military status of William C. Silliman.**—William C. Silliman, who, while an officer of the Fourth Cavalry Regiment, Texas National Guard, was assigned to duty at the Central Officers' Training School at Camp Stanley, Texas, and received training there from September 25, 1918, to December 8, 1918, but who was never mustered into the military service of the United States, is not one of the "persons who have served as officers of the Army * * * of the United States during the World War, other than as officers of the Regular Army * * *" within the meaning of that language as used in the Emergency Officers' Retirement Act (45 Stat. 735), and hence is not entitled to the benefits of that Act. 145.

EFFECT OF RETIREMENT ON PENSION CLAIMS. *See* PENSIONS, 9.

EMINENT DOMAIN.

SITE FOR CUMBERLAND RIVER DAM. *See* NAVIGABLE WATERS, 4.

EMPLOYEES COMPENSATION COMMISSION. *See* FEDERAL EMPLOYEES COMPENSATION ACT, 2.

EMPLOYEES OF GOVERNMENT. *See* CIVIL SERVICE, 2, 3; HOLIDAYS, 1, 2.

ENLISTED MEN.

MAKING GOOD LOST TIME. *See* ARTICLES OF WAR.

EXECUTIVE DEPARTMENTS.

HEADS OF, TERMS OF OFFICE, HOLDING OVER WITHOUT NEW COMMISSIONS. *See* TREASURY, SECRETARY OF, 1.

SPECIFICATIONS FOR IRON AND STEEL. *See* IRON AND STEEL, 1.

EXECUTIVE POWER.

APPROVAL BY PRESIDENT OF BILLS AFTER ADJOURNMENT OF CONGRESS. *See* CONGRESS.

PRESIDENT'S AUTHORITY TO TRANSFER NATIONAL MONUMENTS TO NATIONAL PARK SERVICE. *See* NATIONAL MONUMENTS.

EXPATRIATION. *See* CITIZENSHIP, 1.

EXTENSION OF SERVICE.

TWO YEARS EXTENSION, FEDERAL EMPLOYEES UNDER RETIREMENT ACT. *See* CIVIL SERVICE, 3.

FEDERAL EMPLOYEES.

CONTINUATION IN SERVICE AFTER RETIREMENT AGE. *See* CIVIL SERVICE, 2, 3.

SATURDAY HALF-HOLIDAY. *See* HOLIDAYS, 1, 2.

FEDERAL EMPLOYEES' COMPENSATION ACT.

1. **Employees of the International Fisheries Commission.**—Employees of the International Fisheries Commission, created by the Convention of March 2, 1923, between the United States and Great Britain, are not "civil employees of the United States" within the meaning of the Federal Employees' Compensation Act of September 7, 1916 (39 Stat. 742, 750). 111.
 2. **Employees' Compensation Commission authority under the Longshoremen's and Harbor Workers' Compensation Act.**—The United States Employees' Compensation Commission, under the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, 1442), has broad power and authority to administer its provisions and specifically to make rules and regulations for this purpose which shall be binding upon deputy commissioners as well as upon the Commission. 465.
- COMPENSATION TO VETERAN.** *See* **WORLD WAR VETERANS' ACT**, 8.

FEDERAL FARM BOARD.

- LOANS TO ASSOCIATIONS ENGAGED IN INTRASTATE COMMERCE,**
See **AGRICULTURAL MARKETING ACT**, 2.
- LOANS FOR REFINANCING MORTGAGES.** *See* **AGRICULTURAL MARKETING ACT**, 4.
- AUTHORITY TO DEAL WITH PRODUCERS OF NAVAL STORES**
See **AGRICULTURAL MARKETING ACT**, 5.

FEDERAL POWER COMMISSION.

Legality of appointment of certain members.—Certain persons were nominated by the President for positions as members of the Federal Power Commission, and their nominations were considered by the Senate, which passed resolutions consenting to their appointment. Formal notification of this action was transmitted to the President by the Secretary of the Senate, and in reliance thereon the President made the appointments. Thereafter the President was requested to return to the Senate the notifications of confirmation. *Held*, under the circumstances herein stated, that what transpired in this case amounted to an expression by the Senate of its consent to these appointments and that the appointments were constitutionally made and became effective; and that the return of the papers to the Senate would serve no lawful purpose because no action which the Senate could now take would disturb or operate to revoke the appointments. 382.

DETERMINATION OF NAVIGABILITY OF STREAM. *See* **NAVIGABLE WATERS**, 2.

JURISDICTION, APPLICATION FOR LICENSE TO CONSTRUCT DAM.
See **NAVIGABLE WATERS**, 1-5.

FEDERAL RESERVE SYSTEM.

1. **State member banks establishing or acquiring foreign branches.**—A State member bank of the Federal reserve system can not, since February 25, 1927, establish a branch in a foreign country and continue to hold stock in a Federal reserve bank. 90.
2. **Same.**—A State member bank of the Federal reserve system can not acquire a branch established in a foreign country since February 25, 1927, by consolidating with a State bank which has absorbed or taken over a liquidating national bank having such foreign branch and continue to retain stock in the Federal reserve bank. 90.

FEDERAL SPECIFICATIONS BOARD.

REQUIREMENTS, PURCHASE OF IRON AND STEEL. *See* IRON AND STEEL, 2.

FEDERAL WATER POWER ACT. *See* NAVIGABLE WATERS, 2; WATER POWER PROJECT, 1, 2.

FEDERAL WATERWAYS. *See* WATERWAYS.

FIDUCIARY BONDS. *See* PORTO RICO, 5.

FIRST NATIONAL BANK OF HAWAII. *See* HAWAII.

FLOOD CONTROL.

COLORADO RIVER DAM. *See* BOULDER CANYON PROJECT ACT, 2.
MISSISSIPPI RIVER PROJECT. *See* MISSISSIPPI FLOOD CONTROL, 1.

FLOWAGE RIGHTS.

COMPENSATION FOR, IN BOEUF AND ATACHAFALAYA BASINS.
See MISSISSIPPI FLOOD CONTROL, 2.

FOREIGN-BUILT VESSELS.

COASTWISE TRADE. *See* VESSELS, 1.

FOREIGN VESSELS.

COASTWISE TRADE. *See* VESSELS, 2.

FOREST RESERVES. *See* LANDS, 7.

FORT PECK INDIAN RESERVATION.

REVOCATION OF ERRONEOUS REAPPRAISAL OF LAND. *See* LANDS, 8.

GAS AND OIL.

PUMPING STATIONS. *See* PUMPING STATIONS.

GENERAL ACCOUNTING OFFICE. *See* LEASES, 4.

GEORGIA.

LAWS, ESTABLISHMENT OF BRANCH BANKS. *See* NATIONAL BANKS, 6.

GOVERNMENT EMPLOYEES. *See* FEDERAL EMPLOYEES.

GOVERNMENT PRINTING OFFICE.

Employment of minors.—The Act of May 29, 1928 (45 Stat. 998), regulating the employment of minors within the District of Columbia, is not applicable to minors employed in the Government Printing Office. 10.

GOVERNMENT SPECIFICATIONS FOR SUPPLIES. *See* IRON AND STEEL, 1, 2.

GRAND CANYON NATIONAL PARK, ARIZ.

STATE LICENSES FOR MOTOR VEHICLES. *See* LICENSES, 1-3.

GREAT AMERICAN INDEMNITY COMPANY. *See* COMPROMISE.

HAWAII.

Consolidation of banks.—The Bank of Bishop and Company, Ltd., of Honolulu, Hawaii, is authorized by the Act of February 25, 1927 (44 Stat. 1224), to consolidate with the First National Bank of Hawaii, upon compliance with the conditions imposed by said Act. 59.

AGRICULTURAL MARKETING ACT. *See* AGRICULTURAL MARKETING ACT, 1.

CONSOLIDATION OF CERTAIN BANKS. *See* NATIONAL BANKS, 3.
HOLIDAYS.

1. **Saturday half holiday law.**—As affecting employees embraced within the terms of the Act of March 3, 1931, providing a Saturday half holiday for certain Government employees (46 Stat. 1482), Saturday is to be counted as four hours rather than as a full day in computing annual leave under the Act of March 3, 1893 (27 Stat. 715), as amended, but in computing sick leave under the latter Act Saturday is to be counted as a full day. 407.

2. **Same.**—Field employees of the Navy Department.—Under the Act of March 3, 1931, providing for Saturday half holidays for certain Government employees (46 Stat. 1482), Saturday should be counted as four hours when computing the annual leave provided by the Act of August 29, 1916 (39 Stat. 617), for employees in the field service of the Navy Department. 444.

ILLINOIS STATE WATERWAY.

TRANSFER OF TITLE TO UNITED STATES. *See* WATERWAYS.

IMMIGRATION.

Proclamation by President of national origins quotas.—By the Immigration Act of 1924 (43 Stat. 153, 159), the President is required to proclaim on or before April 1, 1929, the national origins quotas which, in accordance with the Act, have been determined and reported to him by the Secretaries of State, Commerce, and Labor. 4.

IMPORTATION.

TROPACOCAINE HYDROCHLORIDE. *See* NARCOTIC DRUGS, 1.

INDEPENDENT BUREAUS OF THE GOVERNMENT.

SPECIFICATIONS FOR IRON AND STEEL. *See* IRON AND STEEL, 1.

INDIAN LANDS.

COAL AND ASPHALT DEPOSITS. *See* LANDS, 6.

FORT PECK, MONT. *See* LANDS, 8.

INDIANS.

1. **Restricted funds.**—A trust of restricted Indian funds can not be created by agreement of the Indian and a trust company with the approval of the Secretary of the Interior. 98.
2. **Same.**—The Secretary, however, has the power to remove restrictions from certain Indian funds and, where the restrictions are removed from any such fund and the fund is released to the Indian, the Indian may use the fund as he sees fit, and if he desires to create a private trust of it by agreement with a trust company, there is no legal objection to his doing so. 98.

INDUSTRY.

WOMEN IN INDUSTRY, CENSUS DATA. *See* CENSUS BUREAU.

INFANT.

BOND REGISTERED IN NAME OF, ASSIGNMENT BY NATURAL GUARDIAN. *See* BONDS, 1.

INJURIES.

ACCIDENT WHILE ON FLYING DUTY. *See* PENSIONS, 3-5.

ENLISTED MEN. *See* ARTICLES OF WAR.

RESULTING FROM HOSPITALIZATION, COMPENSATION. *See* WORLD WAR VETERANS' ACT, 5, 6.

RESULTING FROM VOCATIONAL TRAINING. *See* WORLD WAR VETERANS' ACT, 1-3.

SERGEANT MAJOR IN CHARGE OF MOTOR VEHICLE ENGAGED IN OFFICIAL BUSINESS. *See* PENSIONS, 2.

SOLDIER, RETURNING FROM LEAVE. *See* PENSIONS, 6-8.

INSURANCE.

DISPUTED CLAIMS. *See* VETERANS' ADMINISTRATION.

INSURED LOSSES, CERTIFICATION OF CLAIMS TO CONGRESS. *See* CLAIMS AGAINST THE UNITED STATES, 1, 2.

POLICIES FURNISHED IN COMPLIANCE WITH LEASES. *See* LEASES, 4.

WAR RISK. *See* WORLD WAR VETERANS' ACT, 4.

INTEREST ON BORROWED MONEY. *See* CLAIMS AGAINST UNITED STATES, 3, 4.

INTERIOR DEPARTMENT.

NATIONAL MONUMENTS TRANSFERRED TO NATIONAL PARK SERVICE FROM DEPARTMENTS OF WAR AND AGRICULTURE.
See NATIONAL MONUMENTS.

INTERIOR, SECRETARY OF.

AUTHORITY TO EXTEND OIL AND GAS PROSPECTING PERMITS.
See OIL OR GAS PROSPECTING PERMIT.

CLAIM FOR INTEREST ON BORROWED MONEY. *See* CLAIMS AGAINST THE UNITED STATES, 3, 4.

COMPLIANCE OF AGRICULTURAL COLLEGES WITH REQUIREMENTS OF MILITARY TACTICS. *See* MILITARY TACTICS.

CONSTRUCTION OF BOULDER DAM. *See* BOULDER CANYON PROJECT ACT, 6.

INTERIOR, SECRETARY OF—Continued.

FLOOD CONTROL COSTS. *See* BOULDER CANYON PROJECT ACT, 2, 3.

INDIAN FUNDS. *See* INDIANS, 1, 2.

PIPE LINE ON PUBLIC DOMAIN. *See* PUMPING STATION.

REAPPRAISAL OF LANDS, FORT PECK RESERVATION, MONT.
See LANDS, 8.

TRAFFIC REGULATIONS FOR ROADWAYS, NATIONAL PARK SERVICE. *See* LICENSES, 1-3.

INTERNATIONAL FISHERIES COMMISSION.

EMPLOYEES, COMPENSATION. *See* FEDERAL EMPLOYEES COMPENSATION ACT, 1.

INTERSTATE COMMERCE.

COOPERATIVE ASSOCIATIONS. *See* AGRICULTURAL MARKETING ACT, 2.

INTERSTATE COMMERCE COMMISSION.

BILLS OF LADING. *See* BILLS OF LADING, 3.

IRON AND STEEL.

1. Government specifications for sheet and plate iron and steel.—

In the preparation of specifications for the purchase by Government Departments and independent bureaus, of sheet and plate iron or steel, whether black or galvanized, or otherwise coated, it is not mandatory that the specifications therefor shall conform to the standard gauge prescribed by the Act of March 3, 1893 (27 Stat. 746). 26.

2. Same.—There is nothing in the Act of March 3, 1893, *supra*, or in any other Act of Congress which precludes the Federal Specifications Board, in the preparation of specifications for the purchase of iron or steel sheets or plates, from specifying that all base iron or steel sheets or plates shall comply with the standard gauge established by said Act, regardless of the protective coating of other metal, or the thickness or weight thereof, which may be specified. 26.

JUDGMENTS.

FINAL, FORFEITED BAIL RECOGNIZANCES. *See* COMPROMISE.

KENTUCKY.

CUMBERLAND FALLS. *See* NAVIGABLE WATERS, 1-5. .

LABOR.

DISTRICT OF COLUMBIA CHILD LABOR LAW NOT APPLICABLE TO GOVERNMENT PRINTING OFFICE. *See* GOVERNMENT PRINTING OFFICE.

WOMEN IN INDUSTRY. *See* CENSUS BUREAU.

LABOR, SECRETARY OF.

COMPUTATION OF NATIONAL ORIGINS QUOTAS. *See* IMMIGRATION.

LAGUNA DAM. *See* BOULDER CANYON PROJECT ACT, 1-3.

LAND-GRANT AGRICULTURAL COLLEGES.

COURSES IN MILITARY TACTICS. *See* MILITARY TACTICS.

LANDS.

1. **Acquisition by the United States of land within the State of New York.**—The Act of New York of April 17, 1896 (Laws 1896, c. 391), and the Act of New York April 5, 1899 (Laws 1899, c. 242), as they have been respectively amended, express the consent of the legislature of the State of New York to the acquisition of land by the United States within their respective limitations. 86.
2. **Same.**—The Act of April 5, 1899, *supra*, should be complied with in the matter of sites, not exceeding 2 acres in extent, for "post offices and other governmental offices" in cities or villages, as has been done in the past; and the Act of April 17, 1896, *supra*, should be complied with in the matter of other acquisitions of land embraced within the scope of its language. 86.
3. **Application for patent to lode mining claim on Molate Island, California.**—The location of the mining claim by Arthur B. Riehl and Louis H. Eilkin, described herein, and covering all but a small part of Molate Island, San Francisco Bay, California, having been duly made at a time when the island was not reserved for lighthouse purposes or for any other public purposes, was a valid and effective location under the mineral land laws; and the location having been duly made and maintained, no legal basis exists for denying to the claimants a patent. 500.
4. **Same.**—Neither Executive Order No. 4099, of November 7, 1924, which purports to reserve Molate Island "for the use of the Department of Commerce for lighthouse purposes," nor the occupation of a small portion of the island by the Department of Commerce in 1925, operated to divest the claimants of any rights in that part of the island covered by the location which had accrued prior to that time. 500.
5. **Conveyance of fee to Government with reservation of subsurface rights for railroad purposes.**—In the proposed acquisition by the Government of certain land in New York City for a post-office site, the real ownership of which is now in the Pennsylvania Railroad & Tunnel Company, though the record title is in the name of a subsidiary corporation, *held*, upon the assumptions herein made, that the corporation which now owns the property has the power to convey the fee, reserving to the railroad company the use of the subsurface for the operation of its railroad and for station purposes, to any person or corporation or to the Government, and that such a conveyance need not limit the use of the property to railroad purposes. 240.

LANDS—Continued.

6. **Indian coal and asphalt lands.—Disposition of royalties.**—The Kali-Inla Coal Company, having leased and later having purchased the coal and asphalt deposits contained in a certain tract of the segregated coal and asphalt lands of the Choctaw and Chickasaw Indian Nations of Oklahoma, is not entitled to a credit on the purchase price of said deposits for royalties under its lease, accruing between the date its bid was made at the auction and the date when approval of the sale was given by the Secretary of the Interior. 473.
7. **Payments in lieu of taxes on restricted railroad land grants.**—Under the Act of July 13, 1926 (44 Stat. 915), amounts in lieu of taxes should be paid to certain counties in Oregon on account of certain areas of reverted Oregon & California Railroad land grants, which were reserved and made parts of national forests by Acts of October 21, 1918 (40 Stat. 1015), and February 11, 1920 (41 Stat. 405). 176.
8. **Revocation of an erroneous reappraisal of land within Fort Peck (Montana) Indian Reservation.**—A final certificate was issued to one Alexander Miller pursuant to his entry on land situate in the Fort Peck (Montana) Indian Reservation. The land had been appraised at \$6.00 per acre and payment therefor was made in accordance with such appraisement. Thereafter the land was reappraised at \$3.50 per acre and Miller was allowed a refund on that basis. Before the patent issued, it was discovered that the reappraisal had been secured by fraud and a second reappraisal was made establishing the fact that the land was worth \$6.00 per acre. Held, that the second reappraisal was within the lawful authority of the Secretary of the Interior and that the entryman Miller may lawfully be required to pay for the land at \$6.00 per acre. 506.

REVERTED RAILROAD GRANTS. *See* LANDS, 7.

SITES FOR PUMPING STATIONS. *See* PUMPING STATIONS.

LEAD FROM COPPER MATTE.

CUSTOMS DUTIES. *See* CUSTOMS LAWS, 1.

LEASES.

1. **Authority of Secretary of War to modify leasing agreements.**—Where property under the control of the Secretary of War has been leased, the Secretary is authorized, when advantageous to the Government, to execute a modified agreement with the lessee containing such stipulations as are herein suggested. 462.
2. **Government property under control of the Secretary of War.**—The power conferred by Congress upon the Secretary of War to lease Government property under his control carries with it by implication the power to make such stipulations as are

LEASES—Continued.

usual between landlord and tenant and reasonably necessary for the proper execution of the power to lease the property. 282.

3. **Same.**—The Secretary of War may stipulate in such lease that certain alterations and improvements, deemed necessary to make the premises suitable for the lessee's use, shall be made by the lessee, the cost thereof to be deducted from the rent reserved, such stipulation being germane to the subject matter of the lease and not unusual in such transactions. 282.
4. **Same.**—Insurance policies furnished to the War Department in compliance with the provisions of leases made by the Secretary of War should be left in the latter's custody, and he is not required to deposit them in the General Accounting Office. 282.
5. **The State Camp for Veterans at Bath, N. Y., was leased for a term of years** by the State of New York to the Board of Managers of the National Home for Disabled Volunteer Soldiers, without rental or charge, upon condition that the same be maintained as a home for veterans of the wars of the United States and that the veterans of the Civil and Spanish-American Wars, who were inmates at the time of the lease, should be maintained therein during the term of the lease, subject to reasonable rules and regulations of the lessee. *Held*, that while the lease did not create any obligation upon the lessee, it did give the lessee the right to remain in possession of the property so long as the Congress should see fit to appropriate funds to maintain it, not beyond the extended term specified, and that whether or not this right belonged to the United States prior to the Act of July 3, 1930 (46 Stat. 1016), by virtue of the fact that the National Home for Disabled Volunteer Soldiers was a governmental agency, that Act has operated to vest all the rights of the lessee in the United States. 484.

INDIAN COAL LANDS, ROYALTIES. *See* LANDS, 6.

LEAVES OF ABSENCE.

SATURDAY HALF HOLIDAY LAW. *See* HOLIDAYS, 1, 2.

LEGISLATION.

APPROVAL OF BILL AFTER ADJOURNMENT OF CONGRESS. *See* CONGRESS.

LICENSES.

1. **State licenses for motor trucks operated in Grand Canyon National Park, Arizona.**—As to the authority of the State of Arizona to require Government contractors engaged in road construction work in the Grand Canyon National Park, Arizona, to take out State licenses for their motor trucks operated within the park limits, the Attorney General is in doubt

LICENSES—Continued.

as to whether he should render an opinion thereon to the Secretary of the Interior, it not being clear that the question involved has arisen in the administration of the latter's Department. 527.

2. **Same.**—The State of Arizona has the power to require privately owned motor vehicles operated anywhere in the State on highway generally devoted to public travel to comply with its motor-vehicle license law. 527.

3. **Same.**—With respect to any traffic on roadways constructed and maintained by the National Park Service, the Secretary of the Interior has power to establish regulations reasonably necessary to carry out the purpose for which the park has been established and is being operated, and with respect to such roadways any State regulations necessarily inconsistent with the regulations of the Secretary of the Interior would be invalid, but no such inconsistency has developed. 527.

See NAVIGABLE WATERS, 1-5; WATER POWER PROJECT, 1, 2.

LOANS.

WORLD WAR VETERANS, ADJUSTED COMPENSATION CERTIFICATES. *See* EMERGENCY ADJUSTED COMPENSATION ACT.

LONGSHOREMENS' AND HARBOR WORKERS' COMPENSATION ACT. *See* FEDERAL EMPLOYEES COMPENSATION ACT, 2.

MAIL.

TRANSPORTATION, CANAL ZONE TO SOUTH AMERICA AND RETURN. *See* CONTRACTS.

MANILA, P. I.

LEGALITY OF BOND ISSUE. *See* PHILIPPINE ISLANDS, 6.

MARINE CORPS.

OFFICERS, RETIREMENT. *See* EMERGENCY OFFICERS RETIREMENT ACT, 1.

MERCHANT MARINE ACT. *See* CITIZENSHIP, 3, 4.

MERCHANT VESSELS.

CITIZENSHIP OF SEAMEN. *See* CITIZENSHIP, 3, 4.

CREWS, CITIZENS OF UNITED STATES. *See* CITIZENSHIP, 3.

MEXICAN BORDER.

ORDER CLOSING PORT OF TIA JUANA. *See* CUSTOMS LAWS, 3, 4.

MILITARY SERVICE.

STATUS OF NATIONAL GUARD OFFICER NOT MUSTERED INTO MILITARY SERVICE OF UNITED STATES. *See* EMERGENCY OFFICERS RETIREMENT ACT, 2.

MILITARY STATUS.

ENLISTED MAN, MISSOURI MILITIA, CIVIL WAR. *See* PENSIONS, 1.

MILITARY TACTICS.

Courses in land-grant agricultural colleges.—The Secretary of the Interior is justified in considering that an agricultural college which offers a proper, substantial course in military

MILITARY TACTICS—Continued.

tactics complies sufficiently with the requirements as to military tactics in the Act of July 2, 1862 (12 Stat. 503), and the amendatory acts, even though the students at that institution are not compelled to take that course. 297.

MINERAL LAND LAWS. *See* LANDS, 3, 4.**MINERAL LANDS LEASING ACT.** *See* OIL OR GAS PROSPECTING PERMITS.**MINERALS.**

LOSSES IN PRODUCTION FOR WAR PURPOSES. *See* CLAIMS AGAINST THE UNITED STATES, 3, 4.

MINING CLAIM.

MOLATE ISLAND, CAL. *See* LANDS, 3, 4.

MINORS.

EMPLOYMENT, GOVERNMENT PRINTING OFFICE. *See* GOVERNMENT PRINTING OFFICE.

MISDEMEANORS.

NAVAL OFFICERS. *See* NAVY, 1.

MISSISSIPPI FLOOD CONTROL.

1. **Legal project.**—The legal project to be executed under the provisions of the Mississippi Flood Control Act, (45 Stat. 534), is the project set forth in House Document No. 90, Seventieth Congress, first session; and this project is fixed and not subject to review or change by this administration. 80.
2. **Same.**—The Attorney General declines to express an opinion upon the question whether the United States is required to provide compensation for flowage rights in the Boeuf and Atachafalaya Basins, as litigation involving this precise question is now pending in the Federal courts. 80.

MIXED CLAIMS COMMISSION.

Awards.—The amounts paid to the Mechanics Securities Corporation and the Equitable Trust Company by the Alien Property Custodian subsequent to the entry of the awards should be considered as payments "credited by the Mixed Claims Commission in making its award," and should be deducted from the principal amount of the award in each case. This reduces the amount of each award to an amount which does not exceed \$100,000, and the Secretary of the Treasury is accordingly authorized, under section 4 (c), 3 of the Settlement of War Claims Act of 1928 (45 Stat. 260, 261) to make payment to each of the claimants without deducting from the amount of such payment the amount of the payments received from the Alien Property Custodian. 411.

MOLATE ISLAND, CAL. *See* LANDS, 3, 4.**MONUMENTS.** *See* NATIONAL MONUMENTS.**MOTOR TRUCKS.**

GRAND CANYON NATIONAL PARK. *See* LICENSES, 1-3.

NARCOTIC DRUGS.

1. **Importation of tropacocaine hydrochloride.**—Tropacocaine hydrochloride, even though manufactured synthetically from a substance other than opium, coca leaves, or cocaine, is a narcotic drug within the meaning of the Narcotic Drugs Import and Export Act and hence can not be lawfully imported into the United States or any territory under its control or jurisdiction. 258.
2. **International transactions.**—Copies of telegrams and cablegrams.—The Secretary of the Treasury has no power to require by regulation telegraph and cable companies to deliver to the Federal authorities for transmission to foreign countries copies of telegrams and cablegrams which are suspected of being prepared in connection with illicit international transactions in narcotic drugs. 21.
3. **Same.**—The Attorney General is not authorized to render an opinion upon the question whether there would be any constitutional objection to the enactment by Congress of legislation requiring telegraph and cable companies to furnish to the Government for transmission to foreign countries copies of telegrams and cablegrams relating to the smuggling of narcotic drugs, because the question is hypothetical; and also because the Secretary of the Treasury is not required to determine the constitutional power of Congress in such legislative field. 21.

IMPORT AND EXPORT ACT. *See* PANAMA CANAL.

NATIONAL BANKING ASSOCIATIONS. *See* NATIONAL BANKS.

NATIONAL BANKS.

1. **Branches for State banks converted into, and consolidated with, national banks.**—Where a State bank, operating in a city of slightly under one hundred thousand population and having three branches, two of which were established prior to the passage of the Act of February 25, 1927 (44 Stat. 1224), is converted into a national bank, the converted bank may retain only the two branches established by the State bank prior to February 25, 1927, and may, with the consent and approval of the Comptroller of the Currency, establish two new branches within the limits of the city of its location, provided the law of the State permits the establishment of branches by State banks. 116.
2. **Same.**—Where a State bank, operating in a city having a population of slightly less than one hundred thousand and having two branches in lawful operation prior to the approval of the Act of February 25, 1927, *supra*, is consolidated with a national bank having two branches authorized by the Comptroller of the Currency pursuant to the provisions of the said Act of February 25, 1927, the consolidated bank may retain only the two branches established by the State prior to Febru-

NATIONAL BANKS—Continued.

- ary 25, 1927, and, after the consolidation, it may, with the consent and approval of the Comptroller of the Currency, establish not more than two additional branches within the limits of the city where said bank is located, provided the law of the State permits the establishment of branches by State banks. 116.
3. **Consolidation of banks located in Hawaii.**—The bank of Bishop and Company, Ltd., of Honolulu, Hawaii, is authorized by the Act of February 25, 1927 (44 Stat. 1224), to consolidate with the First National Bank of Hawaii, upon compliance with the conditions imposed by said act. 59.
 4. **Establishment of branch by National Banking Association.**—The Comptroller of the Currency is without authority to approve the application of the Live Stock National Bank of Sioux City, Iowa, to establish a branch in Sioux City, because the law of Iowa does not permit a State bank to establish a branch or office in that city. 450.
 5. **Same.**—The Comptroller of the Currency is without authority to grant an application of a national banking association to establish a branch within a city in the State of Pennsylvania having in excess of 25,000 population, as the laws of Pennsylvania do not permit the establishment of branches by State banks, and as by subsection (c) of section 7 of the Act of February 25, 1927 (44 Stat. 1228), national banking associations are permitted to establish and operate branches only, "if such establishment and operation are at the time permitted to State banks by the law of the State in question." 344.
 6. **Same.**—The application of the national banking association of Georgia to establish a branch within a city having a population of less than 80,000 must be denied, since the laws of Georgia do not permit the establishment of branches by State banks in cities having a population of less than 80,000, and as by subsection (c) of section 7 of the Act of February 25, 1927, *supra*, national banking associations are permitted to establish branches only where "State banks by the laws of the State in question" are permitted to establish branches. 344.

See also HAWAII.

NATIONAL FORESTS.

REVESTED RAILROAD GRANTS. *See* LANDS, 7.

NATIONAL GUARD.

TEXAS, STATUS OF OFFICER FOR RETIREMENT. *See* EMERGENCY OFFICERS RETIREMENT ACT, 2.

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS.

See LEASES, 5.

NATIONAL MONUMENTS.

Transfer to National Park Service in the Department of the Interior.—It is not within the Executive authority to transfer the national monuments now under administration of the War Department and the Department of Agriculture to the National Park Service in the Department of the Interior. 75.

NATIONAL ORIGINS QUOTAS. *See* IMMIGRATION.

NATIONAL PARKS.

TRANSFER OF NATIONAL MONUMENTS. *See* NATIONAL MONUMENTS.

NATURALIZATION. *See* CITIZENSHIP, 1, 2, 4.

NAVAL OFFICERS. *See* NAVY, 1-4.

NAVAL STORES.

AGRICULTURAL MARKETING ACT. *See* AGRICULTURAL MARKETING ACT, 5.

NAVIGABLE WATERS.

1. **Application for license for power project near Cumberland Falls, Ky.**—The Federal Power Commission has jurisdiction to entertain the application of the Cumberland Hydro-Electric Power Company for a license to construct a dam on the Cumberland River, in Kentucky, near Cumberland Falls. The Commission should grant such license unless the effect of the dam would be to impair substantially the navigable capacity of the lower reaches of the river. 314.
2. **Same.**—In dealing with applications for licenses under the Federal Water Power Act the Federal Power Commission is required to determine the fact of navigability of any given stream. The Attorney General renders opinions only on questions of law, and it would not be in accordance with precedents to submit to him a statement of the evidence and ask for his opinion as to the navigability of a particular stream. 314.
3. **Same.**—In entertaining applications for licenses the Federal Power Commission should look only to the effect of the proposed project upon interstate and foreign commerce, and it should not refuse a license because of scenic, recreational, or like considerations. 314.
4. **Same.**—The granting of a license by the Federal Power Commission to the Cumberland Hydro-Electric Power Company to construct a dam on the Cumberland River near Cumberland Falls would not operate to interfere in any way with the power of the State of Kentucky to acquire, under the power of eminent domain, the site of the proposed dam and the adjacent lands for recreational or park purposes. 314.
5. **Same.**—Recent Kentucky legislation, referred to herein, looking toward the acquisition by the State of an area including Cumberland Falls for park purposes, does not supersede or terminate the authority or duty of the Federal Power Commission

NAVIGABLE WATERS—Continued.

with respect to the application for a license for the proposed Cumberland Falls project. 314.

See also WATERWAYS.

NAVY.

1. **Officers.—Authority of President to drop an officer from the rolls of the Navy.**—One A. E. Tangren, a chief machinist in the U. S. Navy, was convicted by a Federal court of certain offenses against the United States and was sentenced to pay a fine of \$1,000 and be imprisoned in a Federal penitentiary for a period of 18 months. The execution of his sentence of imprisonment was suspended under the Probation Act of March 4, 1925 (43 Stat. 1259), and he took no steps during the term at which his sentence was imposed to alter or set it aside. *Held* that the said Tangren has been “finally sentenced to confinement in a * * * Federal penitentiary” within the meaning of the Act of April 2, 1918 (40 Stat. 501), and consequently may be dropped from the rolls of the Navy by the President. 186.
2. **Same.—Authorized number of line officers of the Navy.**—The total authorized number of commissioned officers of the active list of the line of the Navy, exclusive of commissioned warrant officers, should be computed upon the basis of 4 per centum of 137,485, comprising the permanent authorized enlisted strength of 131,485 plus 6,000 apprentice seamen; and, in determining whether the number of officers thus computed have been commissioned, officers designated pursuant to law as additional numbers in grade should be excluded. 233.
3. **Same.—Computation of commissioned strength of the Navy.**—In computing the total number of commissioned officers of the active list of the line of the Navy, exclusive of commissioned warrant officers, the Secretary of the Navy is not permitted to apply the four per centum fixed by law as the basis for such computation to the 14,000 enlisted men temporarily authorized for instruction in trade schools, in addition to the number of 137,485 comprising the permanent authorized enlisted strength of 131,485 plus 6,000 apprentice seamen. 423.
4. **Same.—Supply Corps.—Assignment of running mate to Commander Charles E. Parsons.**—Commander Charles E. Parsons, Supply Corps, U. S. Navy, who as lieutenant commander was assigned a line running mate of the rank of commander under the Act of June 10, 1926 (44 Stat. 717), is entitled, after his advancement to commander, to retain the running mate previously assigned to him; the Act, *supra*, did not require or authorize the assignment to Commander Parsons of a new running mate. 371.

NAVY DEPARTMENT.

FIELD SERVICE EMPLOYEES, SATURDAY HALF HOLIDAY. *See* HOLIDAYS, 2.

NAVY, SECRETARY OF.

METHOD OF COMPUTING COMMISSIONED STRENGTH OF NAVY. *See* NAVY, 3.

NAVY YARD.

EMPLOYEES, SATURDAY HALF HOLIDAY. *See* HOLIDAYS, 2.

NETHERLANDS GOVERNMENT.

CLAIM UNDER DENT ACT. *See* CLAIMS AGAINST THE UNITED STATES, 5-7.

NEW RIVER, VA.

DAM, WATER POWER PROJECTS. *See* WATER POWER PROJECT, 1, 2.

NEW YORK.

ACQUISITION OF LAND IN NEW YORK BY UNITED STATES. *See* LANDS, 1, 2.

LEASE OF STATE CAMP FOR VETERANS, BATH, N. Y. *See* LEASES, 5.

NEW YORK CITY.

POST OFFICE SITE. *See* LANDS, 5.

NORWEGIAN CITIZENSHIP.

CHILD OF PARENTS RESUMING NORWEGIAN NATIONALITY. *See* CITIZENSHIP, 1.

OCEAN MAIL SERVICE.

CREWS OF VESSELS, CITIZENSHIP. *See* CITIZENSHIP, 3, 4.

OFFICERS. *See* ARMY; DISTRICT OF COLUMBIA; NAVY, 1-4.

OFFICIAL BONDS.

DISCHARGE OF SURETIES. *See* BONDS, 2.

OIL AND GAS PROSPECTING PERMIT.

Authority of Secretary of Interior to condition extension of prospecting permits.—Oil and gas prospecting permits issued under the Mineral Lands Leasing Act of Feb. 25, 1920 (41 Stat. 437) may be extended by the Secretary of the Interior for a period within the statutory limit, and the Secretary and permittee may agree, or the Secretary may grant an extension conditioned, that drilling operations shall be postponed or suspended, leaving, however, remaining within the extension period adequate time to complete a well to the maximum depth required by said act, by the exercise of reasonable diligence. 29.

OIL AND GAS PUMPING STATIONS. *See* PUMPING STATIONS.

OKLAHOMA.

INDIAN LANDS. *See* LANDS, 6.

OREGON.

REVESTED RAILROAD LAND GRANTS. *See* LANDS, 7.

PAN AMERICAN-GRACE AIRWAYS, INC. *See* CONTRACTS, 1.

PANAMA CANAL.

Pardoning power of Governor in case arising under Narcotic Drugs Import and Export Act.—The Governor of the Panama Canal has no authority to pardon Rafael Garcia Burban for the commission of the offense of having violated section 2, sub-division (c), of the Narcotic Drugs Import and Export Act of May 26, 1922 (42 Stat. 596). 220.

PARDONS.

EFFECT, AS TO OFFENSES COMMITTED. *See* WORLD WAR VETERANS' ACT, 7.

PARDONING POWER OF THE GOVERNOR OF PANAMA CANAL. *See* PANAMA CANAL.

PATENT TO LANDS. *See* LANDS, 3, 4.

PENSIONS.

1. **Claims.**—**Lewis D. Atkinson.**—As the 9th Provisional Enrolled Missouri Militia was never inducted into the Federal military service, Lewis D. Atkinson, who served ninety days or more during the Civil War in Company C of that regiment and who was honorably discharged therefrom, is not entitled to the pension rate provided under the provisions of the Act of July 3, 1926 (44 Stat. 806). 247.
2. **Same.**—**Jeanette Burdick.**—Bernie Burdick, a Sergeant Major in the United States Marine Corps, was verbally authorized by the Brigade Commander to visit the Marine Barracks at Cape Haitien. He was directed to leave Port au Prince on April 8, 1929, by a Government-owned truck carrying supplies to Cape Haitien, and to return to Port au Prince the next day by the same means of transportation. While en route to the Marine Barracks at Cape Haitien, the Government-owned truck in which Burdick was riding, and of which he was in charge by reason of a provision of his Brigade's Manual placing the senior in rank in charge of a motor vehicle engaged in official business, became uncontrollable, due to trouble with the steering gear, and plunged down the mountainside, thereby causing injuries to Burdick which resulted in his death. *Held*, under the circumstances herein stated, that Burdick lost his life "in the line of duty" and under such circumstances as to comply with sections 4693 and 4694 of the Revised Statutes; and that his widow, Jeanette Burdick, is entitled to a pension under section 4702 of the Revised Statutes, as amended by section 1 of the Act of August 7, 1882 (22 Stat. 345.) 439.
3. **Same.**—**Priscilla S. Lutz**, widow of an officer of the Marine Corps whose death occurred by reason of injuries received in line of duty, the result of an aviation accident while employed in actual flying, is entitled to one pension for herself and her minor child under sixteen years of age, the issue of her mar-

PENSIONS—Continued.

- riage with said deceased officer, either under the provisions of sections 4702 and 4703 of the Revised Statutes, as amended, or under the provisions of the Act of May 1, 1926 (44 Stat. 382). 164.
4. **Same.**—Claimant must elect the statute under which she will apply for a pension, but she is not permitted to elect to receive part of her pension under one statute and part under another. 164.
5. **Same.**—Claimant is not entitled, under the facts herein stated, to receive a pension of \$6 per month for her minor child under the Act of May 1, 1926, *supra*. 164.
6. **Same.**—**Sidney Floyd Love**, an enlisted man in the Navy, was detailed as night master-at-arms in the United States naval hospital, Great Lakes, Ill., with tour of duty from 9 p. m. to 8 a. m., and liberty from 1 p. m. to 8.30 p. m. On July 12, 1926, he checked out on liberty at 6 p. m., and while returning to his post of duty on his own motorcycle between 8 and 8.30 p. m., he was caught between two automobiles and his right ankle crushed between the running board of one of the automobiles and his motorcycle. *Held*, upon the facts stated and assumed, that he is entitled to a pension. 156.
7. **Same.**—The requirement of section 4694 of the Revised Statutes that an applicant for a pension in the naval service must, at the time his injury is sustained, be "at some naval station * * * or hospital," is satisfied if he is regularly reporting for and discharging his assigned duties there, and his right to a pension is not defeated by reason of the fact that he was injured while absent on a pass or permission of such short duration as not to interfere with such duties. 156.
8. **Same.**—The fact that Love's injury was sustained while he was outside of the boundaries of the naval station or hospital on a few hours' liberty does not in itself necessitate the conclusion that he was not injured "in the line of duty" or not entitled to a pension. 156.
9. **Same.**—**William A. Shaw**. The right of **William A. Shaw** to a pension under the Act of June 5, 1920 (41 Stat. 982), on account of service rendered in the Spanish-American War, the Philippine Insurrection, and the China Relief Expedition, and partial disability (disability to earn a support by manual labor), is not affected by reason of his retirement without pay under the Emergency Officers' Retirement Act (45 Stat. 735). 170.

PERMITS.

PROSPECTING FOR OIL AND GAS. See **OIL OR GAS PROSPECTING PERMIT.**

PHILIPPINE ISLANDS.

1. **Legality of bond issue.—Improvements, Port of Iloilo.**—The proposed issue by the Government of the Philippine Islands of bonds in the sum of \$500,000, the proceeds from the sale of which are to be used for the construction of works and improvements in the Port of Iloilo, Province of Iloilo, being authorized by Congress and by Act No. 3417 of the Philippine Legislature of December 7, 1927, and being within the maximum of indebtedness authorized by law, and all statutory requirements regarding the issue of the bonds having been complied with, said bonds, which constitute the second series of bonds proposed to be issued under Philippine Act No. 3417, *supra*, when issued in the form and amount proposed, will have been legally issued and will be valid and binding obligations of the Government of the Philippine Islands. 102.
2. **Same.**—The proposed issue by the Government of the Philippine Islands of bonds in the sum of \$925,000, the proceeds from the sale of which are to be used for the construction of works and improvements in the Port of Iloilo, Province of Iloilo, being authorized by Congress and by Act No. 3417 of the Philippine Legislature of December 7, 1927, and being within the maximum of indebtedness authorized by law, and all statutory requirements regarding the issue of such bonds having been complied with, said bonds, being the third series of bonds under Act No. 3417, *supra*, when issued in the form and amount proposed, will have been legally issued and will be valid and binding obligations of the Government of the Philippine Islands. 217.
3. **Same.—Port and harbor improvements, Cebu.**—The proposed issue by the Government of the Philippine Islands of bonds in the sum of \$500,000, the proceeds from the sale of which are to be used for the extension of the port works and the improvement of the harbor facilities in the City and Province of Cebu, being authorized by Congress and by Act No. 3413 of the Philippine Legislature of December 7, 1927, and being within the limit of indebtedness authorized by law, and all statutory requirements regarding the issue of such bonds having been complied with, said bonds, being the third series of bonds under Act No. 3413, *supra*, when issued in the form and amount proposed, will have been legally issued and will be valid and binding obligations of the Government of the Philippine Islands. 215.
4. **Same.**—The proposed issue by the Government of the Philippine Islands of bonds in the sum of \$750,000, the proceeds from the sale of which are to be used for the extension of the port works and the improvement of the harbor facilities in the city

PHILIPPINE ISLANDS—Continued.

and Province of Cebu, being authorized by Congress and by Act No. 3413 of the Philippine Legislature of December 7, 1927, and being within the limit of indebtedness authorized by law, and the statutory requirements regarding the issue of such bonds having been complied with, said bonds, which constitute the second series of bonds proposed to be issued under Philippine Act No. 3413, *supra*, when issued in the form and amount proposed, will have been legally issued and will be valid and binding obligations of the Government of the Philippine Islands. 105.

5. **Same.—Purchase of Metropolitan Water District Bonds.**—The proposed issue by the Government of the Philippine Islands of bonds of the face value of \$1,500,000, the proceeds from the sale of which are to be used in the purchase of an equivalent amount of bonds of the Metropolitan Water District, being authorized by Act No. 3255 of the Philippine Legislature of December 3, 1925, and being within the limit of indebtedness authorized by Congress, and all statutory requirements regarding the issue of the bonds having been complied with, and the form of the bond submitted being in substantial compliance with the law authorizing the issue, said bonds, when issued in the form and amount proposed, will have been legally issued and will be valid and binding obligations of the Government of the Philippine Islands. 95.

6. **Validity of bond issue by the City of Manila, P. I.**—The proposed issue by the City of Manila, P. I., of bonds for permanent public improvements in the aggregate sum of \$5,000,000, being authorized by Act No. 3456 of the Philippine Legislature of December 3, 1928, and being within the limit of indebtedness authorized for the City of Manila by Congress, and all statutory requirements regarding the issue of the bonds having been complied with, it will be proper for the Secretary of War to issue the bonds in series as the funds are required and those of the first series, amounting to \$500,000, when issued in the form proposed, will have been legally issued and will be valid and binding obligations of the City of Manila. 56.

AGRICULTURAL MARKETING ACT. See **AGRICULTURAL MARKETING ACT**, 1.

PIPE LINES.

TRANSPORTATION OF OIL AND GAS. See **PUMPING STATION**.

PORTO RICO.

1. **Legality of issue.**—The proposed issue by the Government of Porto Rico of bonds in the sum of \$4,000,000, being authorized by Congress and by Act No. 5 of the Legislature of Porto Rico, approved April 9, 1930, and all of the statutory require-

PORTO RICO—Continued.

ments concerning the issue and sale of these bonds having been complied with, said bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of the people of Porto Rico. 254.

2. **Same.—Payment of Isabela Irrigation System Bonds.**—The proposed issue by the Government of Porto Rico of bonds in the sum of \$750,000, the proceeds from the sale of which are to be used in the payment of the principal of, and interest on, the bonds heretofore issued and sold for the construction of the Isabela Irrigation System, and for the operation and maintenance of said system until such time as the funds necessary for these purposes shall be produced from assessments levied upon lands included within the irrigation district, being authorized by Congress and the Legislature of Porto Rico, and all of the statutory requirements regarding the issue and sale of these bonds having been complied with, said bonds, when issued in the amount and form proposed, will have been legally issued and will constitute valid and binding obligations of the people of Porto Rico. 107.
3. **Same.**—The proposed issue by the Government of Porto Rico of bonds of the face value of \$150,000, the proceeds from the sale of which are to be used in the payment of the principal of, and interest on, bonds previously issued and sold for the construction, operation, and maintenance of the Isabela Irrigation System, being authorized by Congress and by Joint Resolution No. 12 of the Legislature of Porto Rico of July 3, 1929, and all statutory requirements regarding the issue and sale of the bonds having been complied with, said bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of the people of Porto Rico. 469.
4. **Same.**—The proposed issue for the Government of Porto Rico of bonds in the sum of \$150,000, the proceeds from the sale of which are to be used in the payment of the principal of, and interest on, bonds previously issued and sold for the construction, operation, and maintenance of the Isabela Irrigation System, being authorized by Congress and by Joint Resolution No. 12 of the Legislature of Porto Rico of July 3, 1929, and all the statutory requirements regarding the issue and sale of these bonds having been complied with, said bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of the People of Porto Rico. 378.
5. **Same.—River development.**—The proposed issue for the Government of Porto Rico of bonds of the face value of \$300,000, the proceeds from the sale of which are to be devoted to the continuance of the construction of works for development

PORTO RICO—Continued.

and use of the waters of the Toro Negro and Matrullas Rivers, being authorized by Congress and by Act No. 7 of the Legislature of Porto Rico of April 6, 1931, and all the statutory requirements regarding the issue and sale of these bonds having been complied with, said bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of the people of Porto Rico. 516.

6. **Same.**—The proposed issue for the Government of Porto Rico of bonds in the sum of \$500,000, the proceeds from the sale of which are to be devoted to the continuance of the construction of works for development and use of the waters of the Toro Negro and Matrullas Rivers, being authorized by Congress and by Act No. 7 of the Legislature of Porto Rico of April 6, 1931, and all the statutory requirements regarding the issue and sale of these bonds having been complied with, said bonds, when issued in the amount and form proposed, will constitute valid and binding obligations of the people of Porto Rico. 452.

7. **Same.** **Workmen's Relief Commission obligations.**—The proposed issue of bonds for the Government of Porto Rico in the sum of \$500,000, the proceeds from the sale of which are to be used in paying the obligations contracted by the Workmen's Relief Commission, etc., being authorized by Congress and by Joint Resolution No. 60 of the Legislature of Porto Rico of May 5, 1930, and all the statutory requirements concerning the issuance of these bonds having been complied with, said bonds will, when issued in the amount and form proposed and sold by the Secretary of War with the concurrent approval of the Governor and the Treasurer of Porto Rico, constitute valid and binding obligations of the people of Porto Rico. 367.

AGRICULTURAL MARKETING ACT. *See* AGRICULTURAL MARKETING ACT, 1.

POST OFFICES.

SITES IN CITIES OR VILLAGES. *See* LANDS, 2.

SITES, NEW YORK CITY. *See* LANDS, 5.

POSTAL SERVICE.

AIRMAIL CONTRACTS. *See* CONTRACTS, 1.

POSTMASTER GENERAL.

AWARD OF CONTRACT FOR MAIL TRANSPORTATION. *See* CONTRACTS, 1.

TERM OF OFFICE. *See* TREASURY, SECRETARY OF, 1.

PRESIDENT.

APPROVAL OF BILLS AFTER ADJOURNMENT OF CONGRESS. *See* CONGRESS.

AUTHORITY TO DROP OFFICERS FROM NAVAL ROLLS. *See* NAVY, 1.

PRESIDENT—Continued.

EXECUTIVE POWER, TRANSFER OF NATIONAL MONUMENTS.
See NATIONAL MONUMENTS.

NATIONAL ORIGINS QUOTAS, PROCLAMATION. *See* IMMIGRATION.

NOMINATION OF PERSONS AS MEMBERS OF FEDERAL POWER COMMISSION. *See* FEDERAL POWER COMMISSION.

PARDON FOR OFFENSES UNDER WORLD WAR VETERANS' ACT.
See WORLD WAR VETERANS' ACT, 7.

PROSPECTING.

PERMITS, OIL AND GAS. *See* OIL OR GAS PROSPECTING PERMIT.

PUBLIC LANDS.

MOLATE ISLAND. *See* LANDS, 3, 4.

PUMPING STATIONS, OIL AND GAS. *See* PUMPING STATIONS.

REAPPRAISAL OF LAND, REVOCATION OF FRAUDULENT. *See* LANDS, 8.

PUBLIC OFFICE.

ELIGIBILITY OF ANDREW W. MELLON FOR OFFICE OF SECRETARY OF TREASURY. *See* TREASURY, SECRETARY OF, 2.

PUMPING STATIONS.

Establishment within public domain in connection with pipe lines.—Under section 28 of the Act of February 25, 1920 (41 Stat. 437, 449), wherever it is made to appear to the satisfaction of the Secretary of the Interior that the establishment of a pumping station in a public domain in connection with a pipe line for the transportation of oil and gas is reasonably necessary for the operation of the pipe line, he has authority to authorize the grantee to construct such a pumping station and provide the site reasonably necessary for that purpose. 480.

PURCHASE BY GOVERNMENT.

IRON AND STEEL. *See* IRON AND STEEL, 1, 2.

RAILROADS.

GRANT OF FEE TO GOVERNMENT RESERVING SUBSURFACE RIGHTS. *See* LANDS, 5.

RAILROAD MERGERS. *See* ATTORNEY GENERAL, 6.

REVESTED LAND GRANTS. *See* LANDS, 7.

REMINGTON-RAND CO.

CONTRACT FOR RENTAL OF TABULATING MACHINES. *See* CONTRACTS, 2.

RETIREMENT.

ARMY OFFICERS. *See* ARMY.

DISABILITY RETIREMENT AFTER FIVE YEARS SERVICE. *See* CIVIL SERVICE, 1.

CONTINUATION IN SERVICE AFTER RETIREMENT AGE. *See* CIVIL SERVICE, 2, 3.

RETIREMENT—Continued.

EMERGENCY OFFICERS RETIREMENT WITHOUT PAY, PENSION STATUS. *See* PENSIONS, 9.

STATUS OF NATIONAL GUARD OFFICER ASSIGNED TO OFFICERS TRAINING SCHOOL. *See* EMERGENCY OFFICERS RETIREMENT ACT, 2.

TIME LIMIT ON FILING APPLICATIONS. *See* EMERGENCY OFFICERS' RETIREMENT ACT, 1.

ROADS.

CONSTRUCTED, ETC., BY NATIONAL PARK SERVICE, TRAFFIC REGULATIONS. *See* LICENSES, 1-3.

ROYALTIES.

LEASE OF INDIAN COAL LANDS. *See* LANDS, 6.

RUNNING MATE.

ASSIGNMENT TO COMMANDER, SUPPLY CORPS, NAVY. *See* NAVY, 4.

SATURDAY HALF HOLIDAY. *See* HOLIDAYS, 1, 2.

SEAMEN ON UNITED STATES MERCHANT VESSELS. *See* CITIZENSHIP, 3, 4.

SENATE OF UNITED STATES.

EFFECT OF FORMAL NOTIFICATION TO PRESIDENT OF RATIFICATION OF NOMINATION FOR APPOINTMENT. *See* FEDERAL POWER COMMISSION.

SERVICE CERTIFICATES.

VETERANS' ADJUSTED COMPENSATION CERTIFICATES. *See* EMERGENCY ADJUSTED COMPENSATION ACT.

SETTLEMENT OF WAR CLAIMS ACT.

PAYMENTS UNDER. *See* MIXED CLAIMS COMMISSION.

SHIPPING. *See* VESSELS, 1.

SITES.

POST OFFICES, ETC. *See* LANDS, 2, 5.

SOLDIERS.

MAKING GOOD LOST TIME. *See* ARTICLES OF WAR.

SOLDIERS' HOMES. *See* LEASES, 5.

SPANISH-AMERICAN WAR VETERAN.

COMPENSATION FOR INJURIES RESULTING FROM HOSPITALIZATION. *See* WORLD WAR VETERANS ACT, 5, 6.

SPECIFICATIONS FOR SUPPLIES. *See* IRON AND STEEL, 1, 2.

STANDARD GAUGE.

SHEET AND PLATE IRON AND STEEL. *See* IRON AND STEEL, 1, 2.

STATE BANKS.

BRANCH BANKS. *See* NATIONAL BANKS, 1, 2, 4, 5.

STATE MEMBER BANKS. *See* FEDERAL RESERVE SYSTEM, 1, 2.

STATE, SECRETARY OF:

COMPUTATION OF NATIONAL ORIGINS QUOTAS. *See* IMMIGRATION.

STEEL. *See* IRON AND STEEL, 1, 2.

STOLEN REGISTERED BOND.

ISSUANCE OF DUPLICATE. *See* BONDS, 1.

SUBROGATION.

CERTIFICATION TO CONGRESS OF SUBROGATED CLAIMS. *See*

CLAIMS AGAINST THE UNITED STATES, 1, 2.

SYNTHETICALLY PREPARED DRUGS. *See* NARCOTIC DRUGS, 1.

TABULATING MACHINES.

PURCHASE OF EQUIPMENT. *See* CONTRACTS, 2, 3.

TARIFF. *See* CUSTOMS LAWS, 1.

TAXATION. *See* LANDS, 7.

TELEGRAMS.

COPIES, RELATING TO SMUGGLING OF NARCOTIC DRUGS. *See*

NARCOTIC DRUGS, 2, 3.

TEXAS NATIONAL GUARD.

STATUS OF OFFICER FOR RETIREMENT. *See* EMERGENCY

OFFICERS' RETIREMENT ACT, 2.

TIA JUANA.

ORDER CLOSING PORT. *See* CUSTOMS LAWS, 3, 4.

TITLE TO LAND. *See* LANDS, 5.

TRAFFIC.

ROADWAYS, NATIONAL PARK SERVICE. *See* LICENSES, 1-3.

TREASURY, SECRETARY OF.

1. Eligibility of Mr. Mellon for the office.—The head of an Executive Department, with the exception of the Postmaster General, may legally continue to hold his office after the expiration of the term of the President by whom he was appointed at the pleasure of the President for the time being. 12.

2. Same.—Under the statutory provision set forth in Senate Resolution 2, 71st Congress, special session, Mr. Andrew W. Mellon is not disqualified from holding the office of Secretary of the Treasury. 12.

ADVANCES MADE FROM COLORADO RIVER DAM FUND, CONSTRUCTION COSTS. *See* BOULDER CANYON PROJECT ACT, 1.

AUTHORITY TO ISSUE DUPLICATE IN LIEU OF STOLEN BOND. *See* BONDS, 1.

COMPROMISE OF FINAL JUDGMENTS. *See* COMPROMISE.

CONSTRUCTION OF PROVISIO TO SECTION 392, TARIFF ACT OF 1922. *See* CUSTOMS LAWS, 2.

ORDER CLOSING PORT OF TIA JUANA, APPROVAL. *See* CUSTOMS LAWS, 3, 4.

PAYMENTS UNDER SETTLEMENT OF WAR CLAIMS ACT. *See* MIXED CLAIMS COMMISSION.

REGULATIONS REQUIRING TELEGRAPH AND CABLE COMPANIES TO FURNISH COPIES OF TELEGRAMS AND CABLEGRAMS. *See* NARCOTIC DRUGS, 2.

TROPACOCAINE HYDROCHLORIDE. *See* NARCOTIC DRUGS, 1.

TRUST FUNDS. *See* INDIANS, 1, 2.

UNITED STATES.

ACQUISITION OF LAND FOR POST OFFICE SITE. *See* LANDS, 1, 2, 5.

ACQUISITION OF RIGHTS TO CAMP FOR VETERANS, BATH, N. Y. *See* LEASES, 5.

UNITED STATES EMPLOYEES COMPENSATION COMMISSION. *See* FEDERAL EMPLOYEES COMPENSATION ACT, 2.

UTAH.

RATIFICATION OF BOULDER CANYON PROJECT. *See* BOULDER CANYON PROJECT ACT, 1.

VESSELS.

1. **Coastwise trade.**—The following classes of vessels may continue to engage in the coastwise trade and merchandise transported on them is not subject to forfeiture:
 1. Vessels exempted from the requirements of documentation by section 4385 of the Revised Statutes and the Act of April 18, 1874 (18 Stat. 31);
 2. Foreign-built vessels wrecked on the coasts of the United States, when purchased by citizens of the United States and repaired in American shipyards pursuant to the provisions of section 4136 of the Revised Statutes, as reenacted and revised by the Act of February 24, 1915 (38 Stat. 812);
 3. Foreign-built vessels forfeited for breach of the laws of the United States and owned by citizens of the United States and which have been documented pursuant to section 4132 of the Revised Statutes, as amended by the Act of August 24, 1912 (37 Stat. 562). 302.
2. **Same.**—Foreign vessels.—Where passengers were transported by a Japanese vessel from San Francisco, Cal., to Honolulu, T. H., and thence by a British vessel to Sydney, Australia, the transportation of passengers by the Japanese vessel from San Francisco to Honolulu was in violation of section 8 of the Act of June 19, 1886 (24 Stat. 81), as amended by the Act of February 17, 1898 (30 Stat. 248). 352.

VETERANS' ADMINISTRATION.

Adjudication of disputed claims for insurance benefits.—The Administrator of Veterans' Affairs has authority under the World War Veterans' Act, 1924, as amended by the Act of July 3, 1930 (46 Stat. 991), and the Consolidation Act of July 3, 1930 (46 Stat. 1016), creating the Veterans' Administration, in accordance with the proposed regulation submitted by him, to confer power on the Insurance Claims Council to effect a disagreement as required by section 19 of the amendatory Act in cases where no appeal is taken to the Administrator, under such regulations as he may promulgate to govern the procedure and action of that Council; and in cases in which an appeal is taken by the claimant from an adverse decision by such Council, the Administrator has authority to delegate

VETERANS' ADMINISTRATION—Continued.

to the Solicitor of the Veterans' Administration the power to act in the name of the Administrator. 456.

VETERANS' LEGISLATION.

COMPENSATION AND DISABILITY ALLOWANCE, WORLD WAR VETERANS. *See* WORLD WAR VETERANS' ACT, 8.

COMPENSATION FOR INJURY. *See* WORLD WAR VETERANS' ACT, 6.

EMERGENCY OFFICERS' RETIREMENT ACT, VETERANS' BUREAU. *See* EMERGENCY OFFICERS' RETIREMENT ACT, 1.

STATE CAMP, BATH, N. Y. *See* LEASES, 5.

WORLD WAR, LOANS ON ADJUSTED COMPENSATION CERTIFICATES. *See* EMERGENCY ADJUSTED COMPENSATION ACT.

VIRGINIA.

DAM ON NEW RIVER. *See* WATER POWER PROJECT, 1, 2.

VOCATIONAL TRAINING.

COMPENSATION FOR INJURY. *See* WORLD WAR VETERANS' ACT, 1-3.

WAR DEPARTMENT.

ESTIMATES FOR APPROPRIATIONS FOR AIRPLANES. *See* AIRPLANES.

NATIONAL MONUMENTS. *See* NATIONAL MONUMENTS.

WAR MATERIALS.

REQUISITIONED BY UNITED STATES, CLAIM OF NETHERLANDS GOVERNMENT. *See* CLAIMS AGAINST UNITED STATES, 5, 6.

WAR MINERALS RELIEF ACT.

CLAIM OF NETHERLANDS GOVERNMENT. *See* CLAIMS AGAINST THE UNITED STATES, 5-7.

INTEREST ON BORROWED MONEY, CLAIM FOR. *See* CLAIMS AGAINST THE UNITED STATES, 3, 4.

WAR RISK INSURANCE.

LAPSED INSURANCE. *See* WORLD WAR VETERANS' ACT, 4.

WAR, SECRETARY OF.

CONTRACTS, AUTHORITY TO MAKE LAWFUL. *See* BILLS OF LADING, 1, 2.

LEASING OF GOVERNMENT PROPERTY. *See* LEASES, 3.

MODIFICATION OF LEASING AGREEMENTS. *See* LEASES, 1, 2.

SHIPMENTS OF GOVERNMENT PROPERTY. *See* BILLS OF LADING, 3.

WOMENS' BUREAU, LABOR DEPARTMENT.

CENSUS DATA ON LABOR AND INDIVIDUALS. *See* CENSUS BUREAU.

WATER POWER PROJECT.

1. Issuance of license for water power development on New River, Va.—The Federal Power Commission may, in its discretion, issue to the Appalachian Electric Power Company a minor-part license under section 10 (i) of the Federal Water Power Act (41 Stat. 1070), for the construction and operation of a projected water-power development on New River, a non-

WATER POWER PROJECT—Continued.

navigable tributary of the Kanawha River, a navigable stream. 355.

2. **Same.**—The Commission is not required to insert in a lease issued for this project any conditions, except the fifty-year limitation upon the terms of the lease, which, in its judgment, are not necessary or appropriate to fully utilize the waters of the New River in the protection or development of navigation of the Kanawha River. 355.

WATERWAYS.

Federal project for waterway from Utica, Illinois, to Lake Michigan.—Respecting the adoption of a proposed Federal project for a waterway from Utica, Illinois, to Lake Michigan, including the Illinois State Waterway, in advance of an amendment to the constitution of the State of Illinois, and formal transfer of title by the State of Illinois to the United States, *held:*

First: That in dealing with this problem and having in mind the fact that the Illinois constitution may never be amended, and that no State officers may ever be authorized to relinquish this waterway to the United States, we must assume that the powers of the United States are limited to those which it may exercise under the Constitution without the consent of the State. 203.

Second: That with respect to those parts of the waterway under consideration which are navigable streams improved by the State, the powers of Congress are plenary, and without any amendment to the constitution of Illinois or any permission from the State, the United States, under appropriate Acts of Congress, may take complete control over the improvement of navigation and its regulation and provide for and insure to the public perpetual, free navigation. 203.

Third: That as to those parts of the waterway which are entirely artificial, Congress may provide for improvement and control of navigation and for the regulation and control thereof, so as to insure to the public the right of navigation, and to take such action as may be necessary to prevent interference with or obstruction to navigation, but probably subject to the qualification that without the consent of the State it can not be deprived of reasonable compensation for the use of its property. 203.

WIDOWS' PENSION. See PENSIONS, 2, 3.

WOMEN IN INDUSTRY.

CENSUS DATA. See CENSUS BUREAU.

WORDS AND PHRASES.

1. "Arising out of."—The words "arising out of" as used in the workmen's compensation acts require causal connection between employment and injury. 63.

WORDS AND PHRASES—Continued.

2. "At some naval station * * * or hospital."—The requirement of section 4694 of the Revised Statutes that an applicant for a pension in the naval service must, at the time of his injury, be "at some naval station * * * or hospital" is satisfied if he is regularly reporting for and discharging his assigned duties there. 161.
3. "Civil employees of the U. S."—Employees of the International Fisheries Commission, created by the Convention of March 2, 1923, between the United States and Great Britain, are not "civil employees of the United States" within the meaning of the Federal Employees Compensation Act of September 7, 1916 (39 Stat. 742, 750). 111.
4. "Civil life."—The phrase "civil life," as used in section 2 of the act of June 11, 1878 providing a permanent form of government for the District of Columbia, refers to those engaged in civil life, whether or not retired Army officers as distinguished from the military life of an officer in active service. 398.
5. "Claim" as used in sec. 19, World War Veterans' Act.—The term "claim" as used in this section, means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits. 460.
6. "Disagreement."—The term "disagreement" as used in section 19, World War Veterans Act (46 Stat. 993), means a denial of a claim by the Director of Veterans' Administration or someone acting in his name on appeal to the director. 460.
7. "Finally sentenced to confinement in a Federal penitentiary."—One A. E. Tangren, a chief machinist in the U. S. Navy, was convicted by a Federal court of certain offenses against the United States and was sentenced to pay a fine of \$1,000 and be imprisoned in a Federal penitentiary for a period of 18 months. The execution of his sentence of imprisonment was suspended under the Probation Act of March 4, 1925 (43 Stat. 1259), and he took no steps during the term at which his sentence was imposed to alter or set it aside. Held that the said Tangren has been "finally sentenced to confinement in a * * * Federal penitentiary" within the meaning of the Act of April 2, 1918 (40 Stat. 501), and consequently may be dropped from the rolls of the Navy by the President. 186.
8. "In the line of duty."—A sergeant major who was authorized by his brigade commander to visit a certain Marine Barracks and directed to leave on a definite date by a government owned truck carrying supplies to this marine barracks, and to return the next day by the same means of transportation, was injured on the return trip when the motor vehicle became unmanageable, and later died as a result of these injuries; held to have lost his life "in the line of duty." 439.

WORDS AND PHRASES—Continued.

9. **"In the line of duty."**—An injury sustained by an enlisted man while returning to duty at a naval hospital, was an injury "in the line of duty," under section 4693 of the Revised Statutes, and the injured man is entitled to a pension. 156.
10. **"Naval stores."**—"Naval stores," defined in the Naval Stores Act (42 Stat. 1435), are not agricultural commodities within the meaning of the Agricultural Marketing Act and hence the Federal Farm Board has no authority to deal with an organized group of producers of naval stores. 326.
11. **"Result."**—"Result" in the phrase "injury the result of his own misconduct" in the 107th Article of War, is a word in common use and indicates a necessary relation of cause and effect. 479.
12. **"Result."**—The word "result" in the phrase "injury as the result of training" appearing in section 213 of the World War veterans' act, 1924, should be interpreted in the light of the cases decided under the Workmen's Compensation Acts. 64.
13. **"Serviceable airplanes."**—Serviceable airplanes, as used in section 8 of the Air Corps Act, are those airplanes which, although out of repair and not fit for immediate service, do not require general repair or overhauling at the Air Corps depots. 419.
14. **"Unserviceable airplanes."**—Unserviceable airplanes, as used in section 8 of the Air Corps Act, are those in a condition which require general overhauling and repair at the Air Corps depots. 419.

WORKMEN'S COMPENSATION ACT.

DECISIONS, AS GUIDE IN DETERMINING WHETHER INJURY IS CAUSED BY TRAINING. *See* WORLD WAR VETERANS' ACT, 2, 3.

WORLD WAR VETERANS' ACT.

1. **Application of Section 213 to case of William Bickel.**—William Bickel, while in vocational training, accompanied his counselor in an automobile controlled by the latter to the site of a new job, and, while on the premises where the work was to be performed, a branch of a tree caught in the windshield of the automobile and snapped back into Bickel's face thereby injuring his right eye, *held* that Bickel's injury resulted from his training within the meaning of section 213 of the World War Veterans' Act, 1924 (43 Stat. 623), as amended. 61.
2. **Same.**—When Congress inserted in section 213 of the World War Veterans' Act, *supra*, the requirement that injury must result from training, without attempting to define more closely the necessary degree of casual connection, it is assumed it intended that the general word "result" should be interpreted in the light of the cases decided under the Workmen's Compensation Acts. 61.
3. **Same.**—The opinion of June 12, 1926 (35 Op. 76) is hereby modified in so far as it intimates that cases decided under the

WORLD WAR VETERANS' ACT—Continued.

English Workmen's Compensation Act and the Workmen's Compensation Acts of the various States can not safely be resorted to for guidance in determining whether or not an injury in any given case results from training. 61.

4. **Availability of uncollected \$60 bonus to prevent lapse of war-risk insurance.**—A check for the sixty-dollar bonus provided by section 1406 of the Revenue Act of 1918 (40 Stat. 1151) was mailed to an honorably discharged veteran of the World War on April 21, 1919, and was received by him while he was on his deathbed and unable to collect or negotiate it. He died April 26, 1919, and thereafter the check was paid to his widow, upon her indorsement. *Held*, under such circumstances, that the mailing of the check and its receipt by the payee did not constitute payment; that the amount thereof was uncollected at the time of payee's death and was therefore available to prevent lapse of his war-risk insurance under section 309 of the World War Veterans' Act, 1924, as amended; and that this was unaffected by the subsequent payment of the bonus to the widow of the payee. 113.
5. **Compensation for injury to veteran of Spanish-American War resulting from hospitalization.**—An honorably discharged veteran of the Spanish-American War, who was admitted to a Veterans' Bureau hospital and who in the course of his treatment sustained a fracture of the right femur, is entitled to the compensation provided by section 213 of the World War Veterans' Act, 1924, as amended. 101.
6. **Same.**—Military service during the period of the World War is not essential in the case of one otherwise entitled to the compensation provided by section 213 of the World War Veterans' Act, 1924, as amended. 101.
7. **Effect of pardon upon offenses committed under section 504.**—One Leroy Damron pleaded guilty in a Federal court "to making a false and fraudulent statement concerning his claim as a vocational trainee," under section 504 of the World War Veterans' Act, as amended. Upon his conviction, sentence was suspended and he was placed on probation. Subsequently the President granted him "a full and unconditional pardon for the purpose of releasing him from probation and restoring his civil rights." *Held* that the pardon of Damron by the President restored him, as of the date of the pardon, to the rights to which he was entitled under Titles II and IV of the World War Veterans' Act, as amended, prior to the commission of his offense. 193.
8. **Receipt by veteran of compensation and disability allowance.**—Payment of the disability allowance provided by section 11 of the Act of July 3, 1930, entitled "An Act to amend the World

WORLD WAR VETERANS' ACT—Continued.

War Veterans' Act, 1924, as amended" (46 Stat. 995), is authorized, even though the recipient of such allowance is now receiving compensation under the Federal Employees' Compensation Act (39 Stat. 742) for the same injury upon which his application for the disability allowance is predicated. 420.

POWER TO EFFECT DISAGREEMENT. *See* **VETERANS' ADMINISTRATION.**

